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THE UNWED FATHER –UNWORTHY ?

The position of the natural father in South Africa following the Constitutional Court decision in Fraser v Children's Court Pretoria North.

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1. INTRODUCTION

"Both the interim and final constitution outlaw unfair discrimination and entrench equality between men and women. Equal protection before the law, privacy and the protection of our children. The question is thus whether the rights so entrenched are not being infringed by the laws that currently regulate parental responsibility to the children born outside of formal marriage." [1]

Few topics in South African Family law have received as much attention by the Courts, Legislators, academics and the general public as the legal relationship between fathers and their extra-marital children. The widespread national interest peaked recently in 1997 in the delivery of the sensationalised Fraser[2] judgement by the South African Constitutional Court. Through the declaration of this judgement, the Court broke new ground in pronouncing decisively not only on the rights of an unmarried father but also on the application of the right to equality within the context of a post-constitutional South Africa.

While the dispute in this case was limited to the rights of unmarried fathers in the adoption proceedings of their biological children, the case highlighted the plight of the unmarried father as a whole. More particularly it looked at the fathers claims to custody, access and guardianship. The law in this regard has long been controversial. Despite the repeated calls for the laying down of cogent legal policy to cope with the growing phenomenon of the unwed father, a legal vacuum has been created[3]. The suggested reasons for the legal lacuna shall be considered.

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[11] Chaskalson et al Commentary on South African Constitutional Law par 34.2
[2] Fraser v Children's Court Pretoria North & others 1997 (2) SA 261 (CC)
[3] Clark B "Should the unmarried father have an inherent right of access to his child?"

The widespread public interest generated by the Fraser judgement[4] is an indication of the growing number of individuals affected by legal developments which regulate the relationship between children born out of wedlock and their fathers.

The years following World War II have been characterised by sweeping changes to social and economic structures. These changes have impacted greatly on the family unit. As the notions of class, gender and race have slowly been dismantled so too has the traditional rigid concept of the nuclear family. The modern family has moved away from the divided gender roles of the past and has become a more fluid entity extending to, *inter alia*, cohabitation and same sex unions. This progression has taken place both internationally and within South Africa. As the Canadian family lawyer, JD Payne,[5] put it,

> "Although some will look back with nostalgia to the traditional nuclear family of the 1950's with its breadwinning husband, its homemaking wife, and their two children, that is now a minority group in terms of contemporary family structures in Canada. Today Canadian families take a wide variety of forms. They include childless marriages, two-parent families, single parent families in which the mother is the primary caregiver, single parent families where the father is the primary caregiver, Common law relationship...Family structures may also vary according to ethnic and cultural factors...Traditional notions of the family must clearly be re-examined in the search for rational and equitable social and equitable legal policies."

As the traditional family model undergoes transformation, so too must the notions of the roles and positions of the individual family members. As Mosikatsana writes,[6]

> "In the late 1990's fatherhood has become increasingly politicised as is evident from the debate generated by the Fraser case. The debate on fatherhood has also become

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[4] Fraser v Children's Court Pretoria North 1997 (2) SA 261 (CC)

[5] Payne & Payne Introduction to Canadian Family Law p 2

> facilitated by changes in the family, resulting from mothers' increased labour force participation, division of labour within the family, and the concern with the well being of children. The new democracy in South Africa has facilitated a context for a family policy debate and research agenda which addresses the issue of fatherhood in qualitatively new ways."

While the instance of children born out of wedlock has grown locally and internationally, as a result of South Africa's peculiar sociological and legal legacy, illegitimacy in this country is particularly prevalent. One of the reasons for the high numbers is the fact that the South African Law of Marriage does not recognise certain traditional unions.

Hindu, Muslim and African marriages as potentially polygamous marriages have traditionally been denied the legal status of a valid marriage. [7] The progeny of such unions has therefore been declared illegitimate. The impact thereof is that a great number of children born to these unions are affected by regulations regarding illegitimacy. A new act, The Recognition of Customary Marriages Act 1998 has been passed. This act aims to award recognition to African Customary Marriages. However at the time of writing it was yet to come in to operation and deals only with African customary marriages. The Act does not deal with the important issue of the status of Islamic and Hindu marriages. While it is suspected that the Constitutional Court will soon rule decisively on the status of these unions, neither the courts nor Parliament have seized the opportunity to intervene in this matter.[8]

The high rate of illegitimacy can also be ascribed to the abortion laws which were in place before The Choice on Termination of Pregnancy Act[9] came into effect in 1997. The conditions under which abortions were allowed were particularly

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[6] Mosikatsana "Is Papa a Rolling Stone ? The Unwed father and his Child in South African Law- a Comment on Fraser v Naude" CILSA 1996 p158

[7] Dhanabakium v Subramanian 1943 (AD) 160

[8] N Goolam "The Law of Islam" Schafer's Family Law Service 24th Service.

stringent and as a result abortion was not an option available to the majority of women. Many children were born out of wedlock to reluctant mothers.[10] The prevalence of extra-marital births has been linked to an exhaustive list of socio-economic factors which include migrant labour, poverty and the position of women in society *inter alia*.[11] Unfortunately these causes cannot be considered further here.

Despite the frequent calls for cogent legal policy on the question of the natural father, it was only in 1997 that the constitutional court was called upon to make a judicial pronouncement in the Fraser decision.[12] As a consequence, a new act entitled The Natural Fathers of Children Born Out of Wedlock Act of 1997 [hereafter referred to as The Natural Fathers Act], was promulgated shortly afterwards. In order that these developments are properly assessed, it is important to consider the broader context in which they occurred. This necessitates a thorough investigation of the long line of judicial precedent, Common Law sources, the statutory law and relevant portions of the Constitution.

Furthermore the developments themselves require examination. The South African experience is not unique and in order to assess the worthiness of the new legal policy it is necessary to compare our experience with those of other jurisdictions which are themselves forging new policies regulating the position of unmarried fathers. Due to restrictions in content I have restricted the comparative study to the jurisdiction of the United Kingdom (England and Scotland).

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[9] Act 92 of 1996

[10] S Burman in the editorial Chapter, Burman S & Preston Whyte Questionable Issue ? Illegitimacy in South Africa 1992

[11] *ibid*

[12] Fraser v Childrens Court Pretoria North 1997 (2) SA (CC)

The United Kingdom model is relevant as it has developed a long line of cases which forms an important legal source. Our courts have often borrowed from the English law which is used as a persuasive legal source in our jurisdiction particularly in instances when the South African sources have been exhausted. The position of the natural father cannot be said to be sufficiently governed by Roman Dutch Law,[13] as the case law is confusing, as will be shown below,[14] and the statute so new that it is yet to be applied. It would therefore appear that here reference to United Kingdom Law is particularly appropriate. It is also interesting to note the influence that the English statute, The Children's Act 1989 has had on The Natural Fathers Act 1997,if any.

[13] B v S 1995 (3) SA 571 (A)
[14] Please see Chapter 2.4 *infra.*

2. SOUTH AFRICAN LAW BEFORE 1997.

> "The father has no rights in respect of the children. He has no parental power and is not the legal guardian."[15]

Clark and Van Heerden, writing in 1992, summarised the Common Law position of the unmarried father in the above extract. The various sources comprising the Common Law will be examined to indicate the background which gives rise to such a summation.

2.1 Roman Dutch Law

Unfortunately Roman Dutch Law, the traditional source of South African Common Law does not achieve clarity on the issue. Many Roman Dutch writers either did not address the concept of unwed fathers directly or disregarded the role of the father to the point that the child was considered fatherless.[16]

2.1.1 Roman Dutch Authorities cited by the courts

The Roman Dutch principle of "een moeder maakt geen bastard" (a mother does not a bastard make) has been quoted in support of the view that an unmarried father was not considered to be a parent to his extra- marital child. In the 1987 case of F v L,[17] Judge Harms referred to the Roman Dutch writer, Van Leeuwen and stated at p 526 of the judgement,

> " According to Van Leeuwen ...so called "speelkinderen" are considered as if they have no father. In a footnote he adds that except for children of noblemen illegitimate children are *quoad* their father considered as strangers."

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[15] Clark and Van Heerden "The legal Position of Children Born out of wedlock" in S Burman Questionable Issue ? Illegitimacy in South Africa 1992

[16] Boberg The Law of Persons and the Family 1977 p 355

[17] FvL 1987(4) SA 525 (W)

In the 1995 Appellate Division judgement B v S,[18] it was argued on behalf of the unmarried father that the Roman Dutch Law, unlike Roman Law, recognised the unmarried father by placing him under a duty to support his illegitimate child and by requiring his consent for his child's marriage. However Judge Howie, in his majority decision, stated that not withstanding the limited legal recognition that the natural father may enjoy, that this recognition could not bestow upon the father any parental authority over his child. He could not then of right lay claim to the consequences of such authority, which in that case was the right of access. The Court states at 575 D ff.

> "Access like custody is an incident of parental authority...Consequently if access is the fathers entitlement as a matter of inherent legal right, it can only stem from his parental authority. The duty of support and marriage impediment in no measure imply the existence of any parental authority from which the supposed right of access could have been derived."

The Court went on to consider the Roman Dutch writers and stated at page 525 paragraphs G to I,

> "The fact is that in Roman Dutch Law an illegitimate child fell under the parental authority and thus the guardianship and custody of its mother, the father had no such authority."

2.1.2 The Relevance of Roman Dutch Law Today

Despite the relative paucity of authority found in Roman Dutch Law, the old Common Law is a useful starting point for discussion. It has provided the terminology still applicable today such as "illegitimacy" and "parental authority". In fact, the definition of legitimacy relied upon by the Courts[19] and by respected writers such as Spiro, is founded in the works of the Roman Dutch writers; Voet, Grotius, Van Leeuwen and others.

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[18] B v S op cit
[19] F v L op cit

Spiro, in Law of Parent and Child,[20] sets out the various circumstances of birth which would render a child legitimate and on that basis forms a definition of illegitimacy. Children who are either conceived or born during the subsistence of the marriage of the child's parents are all presumed legitimate on the basis of the Common Law presumption, *pater est quem nuptiae demonstrant.* Those children born out of wedlock whose parents later marry are legitimated by the subsequent marriage.[21]

Roman Dutch Law is of relevance to the modern dilemma of the natural father for a further reason; while we have entered an age of constitutional supremacy, the Constitution has not completely replaced the Common Law. The courts are obligated in terms of Section 35 of the Constitution, also termed the interpretation clause, to develop the Common Law so that it is consistent with constitutional values. As Judge Pillay stated in the recent Wicks v Fisher[22]case at p511,

> "I am mindful of the modern trend in custody and access issues relating to illegitimate children, according rights to the father of an illegitimate child not recognised at common law. However I am enforced in terms of our constitution to develop the common law to promote the objects of the bill of rights."

Although the Roman Dutch Law has provided some useful authority, it leaves many questions unanswered. This is because not only have dramatic social changes occurred since the recording of the Common Law but recent developments in medical science have rendered a portion of those writings obsolete. The focus of much of the Roman Dutch Law was on the factual question of paternity. While various legal theories and presumptions were formulated to determine the question of fatherhood, today DNA fingerprinting can affirm with over 99% accuracy the identity of the father. [23]

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[20] Spiro Law of Parent and Child 1985 p 20
[21] ibid
[22] Wicks v Fisher 1999(2) SA 504(NPD)
[23] Clark and Van Heerden op cit p38

Despite the debates surrounding the Roman Dutch Law, it is clear is that these principles were heavily relied upon in the drafting of the only statute on point in pre – 1997 South Africa, The Children's Status Act 82 0f 1987.

2.2 Customary Sources

2.2.1 Customary Law as a Source of Law

African Customary Law is an important but complex source of Law in a post - Constitutional South Africa. The tenor of the Bill of Rights is that of one which recognises the pluralistic nature of the South African society and the right to self –determination is guaranteed in Section 235.[24] It has therefore been argued that certain groups have a right to be governed by Customary Law.[25]

Bennet considered the interim constitution in order to assess the current status of African Customary Law and stated,[26]

> " Section 31 of the Constitution provides the rudiments of a new approach to Customary Law. It states that, "Every person shall have the right to use the language and to participate in the cultural life of his or her choice." On the basis of this section supplemented with the authority of international and comparative foreign law, an argument can be made that the state is now obliged to recognise and apply customary law in its courts."[27]

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[24] Section 235 states, "The Right of South African people as a whole to self-determination , as manifested in this Constitution does not preclude, within the framework of this right, recognition of the notion of the right of self- determination of any community sharing a common cultural and language heritage, within a territorial entity in the Republic or in any other way determined by national legislation."

[25] Bennet Human Rights and African Customary Law

[26] Bennet op cit 23

[27] Although section 31 has been replaced by section 30 of the new Constitution , the wording has remained the same

The Constitution promotes the right to culture in Family Law matters further in Section 15(2) ii which is entitled 'Freedom of religion, belief and opinion', by providing,

> " This section does not prevent legislation recognising ....
>
> (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion."

While it has been commented that this provision was inserted to provide for the recognition of African customary marriages,[28] it does also serve to reinforce the relevance of African Customary Law to the legal system as a whole.

However, the right to customary law is controversial. The right to culture does not exist in a vacuum and as such must be seen within the context of the Bill of Rights. African Customary Law has been labelled patriarchal and sexist by many authors. As Sinclair writes,[29]

> " Although it is true that our civil law is also based on patriarchy, women have made substantial gains in achieving formal equality within that system. This is not true of African Customary Law, which remains fundamentally premised on patriarchal notions that are largely unchallenged and highly controversial."

Hence it is clear that African Customary Law maybe interpreted by some to offend against the right of women not to be unfairly discriminated against in terms of the right to equality. Ultimately this seeming contradiction will have to boil down to a balancing of rights. It must be borne in mind that the limitation clause, Section 36, provides for the limitation of certain rights. It is submitted that as there is a right to culture and tradition, the legislature and judiciary are enjoined to apply such systems of law where appropriate. However, the

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[28] Currie,"Indigenous Law" Chapter 36 Chaskalson et al op cit

[29] Sinclair "Family Rights" in Van Wyk, Dugard ,De Villiers and Davis Rights and Constitutionalism p 561

application of these rights is limited to circumstances in which the competing right to equality is not compromised. The right to equality will receive further discussion below.

Another problem, which is encountered in the application of African Customary Law, is far more practical. There is no homogenous system of African Customary Law. In this country separate indigenous heritages, traditions and systems of rules exist. Notwithstanding this diversity, certain principles of African Customary Law have been extracted and presented as reflective of African tradition.

2.2.2 Illegitimacy

Illegitimacy in the African setting takes place on two levels; firstly there are those children who are deemed illegitimate by virtue of Customary Law and secondly there are those children who are legitimate in terms of African Custom but are illegitimate in Civil Law. This is due to the fact that, as mentioned above, many African unions are still not recognised as valid unions in the eyes of South African Law.

Unlike Civil Law, the status of illegitimacy in African custom is not dependant on the marital status of the parents but rather on the payment of lobolo (bridewealth). Bennet summarises the law concisely by stating,[30]

> " The relationship between a mother and child is socially close and obvious; the same is not necessarily true of the relationship between a father and child. Payment of bridewealth fixes and proclaims the link between men and children. Hence the customary-rule is that if bridewealth has been paid, the child will be attached to its father's family; otherwise it is part of the mother's family "

It is then clear that there might be situations where the two legal systems conflict. For example a couple may enter a valid marriage in terms of South African Law, however, the father may not have made the requisite lobolo payments in which

case the Court might be at a loss as to whether to define the child as extra-marital or not. It is submitted that in such instances, the Court should apply the system that would most benefit the child. In the current example, it would be in the child's best interests to be deemed legitimate and as such the civil legal system should be applied.

In a similar vein to the civil system, African custom provides that the offspring of a married woman are deemed the legitimate children of her husband. [31]

2.2.3 Parental Authority

In terms of African Customary Law, as applied by our courts, the natural father has no inherent rights to the child and acquires these rights through the marriage to the child's mother and through the payment of lobolo. [32]

Bennet wrote that in most traditional systems a father could acquire parental rights through payments to the child's guardian. Either the payment of seduction damages, which functioned as compensation for disgracing the mother and her family would suffice or in some traditions, such as the Nguni custom, an additional payment in order to confirm the father's paternal rights was required. The additional payment was regarded as compensation to the mother and her family for the burden of raising the child.[33]

This system has come under criticism from legal commentators and judges as it has been argued that the acquiring of rights to the child through the payment of money is tantamount to the purchase and sale of a child. Courts have also been reluctant to apply this system as it could conflict with the Court's primary responsibility to uphold the best interests of the child.[34]

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[30] Bennet Sourcebook on African Customary Law for Southern African p 358
[31] Clark and Van Heerden op cit p 43
[32] Bennet op cit p 358
[33] Bennet African Customary Law p 373
[34] Clark and Van Heerden op cit p45

2.2.4 Adoption

The Child Care Act in section 27, which section was subsequently repealed, afforded limited recognition to African Customary Unions. The act provided that a "customary union" as defined in the Black Administration Act 38 of 1927 was deemed a marriage for the purposes of chapter four of the Child Care Act. Chapter four regulated adoption procedures and as such those fathers who qualified in terms of the Black Administration Act were required to offer their consent to the adoption of their children born within a customary union.

2.3 Statute

While the Common Law did not have sufficient cogent legal policy to cope with the growing incidence of illegitimacy, the only act which dealt specifically with extra – marital children in the years preceding 1997, The Children's Status Act,[35] did little to ameliorate the position.

This act was passed, as the name suggests, to eliminate the differences in legal status between illegitimate and legitimate children. The act aimed to remove the stigma associated with illegitimacy. However, it did not address in any meaningful way the difference in the relationships between legitimate children and their fathers and illegitimate children and their fathers.

It is important to note that contact with both parents is a child's right enshrined in the UN Convention on the Rights of the Child.[36]This Convention was passed in 1989 a mere two years after the passing of the Children's Status Act[37]. However South Africa only ratified the Convention in 1995.

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[35] Act No 82 of 1987
[36] United Nations Convention on the Rights of the Child 1989
[37] Act No 82 0f 1987

2.3.1 South African Law Commission Investigation

In 1984 the South African Law Commission (hereafter the SALC) compiled a report upon which the Act is based. After the Law Commission briefly considered the case law and the question of an unmarried fathers claim to parental power, the SALC recommended as follows at paragraph 8.27.[38]

> "It is clear from the outset that parental power cannot be granted *ex lege* to all fathers of illegitimate children."

At 8.19 the SALC recommends:

> "Legal policy ought to be one of minimum interference – therefore the law should leave a father to do as he pleases regarding access and only clamp down on him when he abuses it.... Since legal development is tending in the right direction, it is undesirable for the legislature to interfere at this stage."

This suggestion is unhelpful as firstly the Law Commission does not at any stage define the term "right direction". We are not told what that "direction" is and why it is that that direction is the "right" one. However, what is of even more concern is that the Commissioners clearly follow a "non-interventionist" approach to Family Law. This approach posits that the nature of family life is private and should not be regulated by Government. This school of thought avers that as no two family situations that the family members should not be regulated by universally applicable laws.[39]

While the standpoint is not without merit, it is submitted that the question of an unwed father's right to access is an important one and has involved the balancing of the best interests of the child against parental rights to have contact with their children. This is a debate fraught with complexities and is a dispute so commonly encountered today that it cannot be left to the father to "do as he pleases". The various parties affected i.e. the mother, father and child are

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[38] SALC "Report on the Investigation into the legal position of illegitimate Children" Project 38/1985

entitled to greater certainty as to their rights and responsibilities than the approach put forward by the SALC. As Bonthuys wrote recently, [40]

> " One of the most important advances in the law relating to children has been the realisation that society has the right to pierce the veil of privacy surrounding the home and to prescribe behaviour in this sphere hitherto regarded in the light of a man's home being his castle. Examples are the increased legal concern with matters such as domestic violence, marital rape, child abuse and lately also the abuse of the elderly."

It would then appear that the SALC has not kept up with the reforms in Family Law. The non-interventionist school of family law has been associated with the positivist ideologies of the 19th and early 20th Centuries[41] and has been criticised for not laying down functional social and legal policies. Today certain social values required in society have been recognised. Regulation, which imports these values into society by intervening into the private sphere, has been promoted. Bonthuys writes,[42]

> "The change is premised on the idea that family and genetic ties cannot be used to justify all forms of behaviour and society has to set social standards for behaviour."

As the determination as to whether the father has such a right to access has such far-reaching results, it is submitted that regulation is vital in this regard. The line of precedent is so confused and the waters so muddy, judges such as Howie in the B v S[43] judgement have been forced to request legislative intervention:

> "If there are sound sociological and policy reasons for affording such fathers an inherent access right in addition to the right they already have to be granted access where it is in the best interests of their children, then that is a matter that can only be dealt with legislatively".

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[39] C Smart " Regulating families or legitimating patriarchy ? Family Law in Britain" 1982 Family Law p 152

[40] Bonthuys "of Biological Bonds , new fathers and the best interest of the children" SAJHR 1998 p 636

[41] C Smart op cit p159

[42] Bonthuys op cit p 638

[43] B v S op cit at p 579 par I

2.3.2 The Children's Status Act

The wording of the act is almost identical to that of the SALC's recommendations. Considering the contents of the report it is then not surprising that the important questions regarding the unwed father's rights to custody, guardianship and access were not taken any further. Notwithstanding the obvious omissions, the act does lend clarity to certain issues. The preamble reads, "To amend the law relating to paternity, guardianship and the status of certain children". Although the preamble mentions "certain children", the reference is clearly to the extra marital child.

The first purpose of the act was the regulation of the law pertaining to paternity. Many cases involving unwed fathers before 1997 were fought on two legs. If it was the case that either of the parents disputed the question of paternity then the first stage in proceedings would be the resolution of that dispute. Only once paternity was established could the fathers' rights or duties be argued before the Court.[44] The Common Law had developed certain presumptions to assist in such a dispute.

While the act followed these presumptions, they were modified to be more workable in a modern age. For example, in terms of Roman Dutch Law, it need only be proven that a man had had intercourse with a woman at any time for a presumption of paternity to apply. This cast the net of paternity very widely. However the drafters followed the case of F v L[45] and created a more reasonable standard. The act states that it is first to be proven that the couple had had intercourse at a time when conception could have occurred, "the critical time" for the presumption to operate.[46]

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[44] F v L op cit
[45] F v L op cit
[46] Spiro Annotations to Recent Extra-Marital Legislation 1988 p 2

As mentioned above[47], a DNA test can today positively identify a father whereas to the old blood tests, which operated negatively, could only conclusively disprove a paternity claim. This development, which has occurred within the decade has had a dramatic effect on the Law regarding the Natural Father. Lupton writes[48],

> " The genetic information each of us carries in our cells is inherited from our parents and thus the tests can be used to establish family relationships. Disputes over paternity can now for the first time be positively resolved beyond reasonable doubt."

In the past a father disputing a claim of paternity could conclusively prove that he was not the father. Therefore a man escaping a potential maintenance claim could rely on the blood tests, whereas a father wishing to assert paternity was in a weaker position and could not be assisted by medical science in the eradication of all doubt as to his fatherhood. The factual uncertainty could lead to a tenuous relationship between a natural father and his child. The recent legal reforms in this area must then be seen in the context of medical development.

Although not all the legal presumptions of paternity are relevant today, the second section contained in the act is a particularly useful legislative provision. The statute lays down that if paternity is in dispute, a refusal to consent to blood tests by a party to the dispute is presumed to be aimed at the concealing of the truth.[49] The provision establishes certainty as it has the effect of compelling the parties to submit to blood tests. Both the child's best interests and the father's rights are served by such a provision which is designed at achieving truth and certainty.

A further progression made in the act was one of terminology. Before the advent of the act the term "bastard" was often used to describe extra-marital children.

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[47] Please see Par 2.1.2 *supra*

[48] Lupton "Medico-legal Aspects " Issue 23 Schafer's Family Law Service p 33

The act replaced this word with the term "extra-marital. This is not simply a question of semantics. A change of this nature reflects a policy change, which runs to the very core of the debate surrounding natural fathers. It has been posited in the past that the illegitimate child suffers in law as a result of the sins of the fathers.[50]

The term "bastard" arises out of the conservative approach which condemned procreation outside of marriage and which stigmatised the offspring of such "sinners". Through the restructuring of the discourse surrounding the debate, the legislators create a climate of tolerance towards extra-marital relationships and smooth the way for normal relationships between natural fathers and their children.

The act includes a section headed," Guardianship and Custody of Extra-marital Children." This title is misleading as the legislature purports to regulate this vexed area of law while in fact it does not. Only one remote situation is catered for in this section, the position of an unmarried mother who has not yet attained the age of majority. The act provides that in such circumstances the custody of the child will vest in the minor mother while the guardianship vests in the guardian of the mother. [51]

It can only then be assumed that the issues pertaining to the custody and guardianship of extra-marital children were not omitted from the act as a result of an oversight on the part of the drafters. The legislators were presumably of the opinion that it was trite law that these powers vested in the mother and as such did not necessitate regulation. Further, on an interpretation of the statute it can be deduced that if a minor mother has custody that *a fortiori* an adult mother is vested with such a right.

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[49] ibid
[50] Boberg " The sins of the fathers and the law's retribution" Businessman's law 1988 p35
[51] Section 3 Children's Status Act 82 of 1987

It is submitted however that the legislators should have attempted to address the question of the father's claims to parental authority and the validity thereof. This is particularly important in cases where the child does not have a mother with parental authority, either as a result of the mother's demise or through a lack of competence on her part. The Court's decisions regarding a father's claim in these instances have varied dramatically. It has therefore been difficult to ascertain whether the natural father enjoys a special relationship by virtue of his biological ties or whether he is, in the words of the Court, a "stranger to the child."[52]

It is unfortunate that the legislators did not see fit to lend clarity to the father's position *vis-a-vis* his child, particularly in the aforesaid circumstances as the reluctance of Parliament to intervene would plunge South African Law into a decade of legal uncertainty.

2.4 The Case Law

> "In 1948 in Fletcher v Fletcher the Appellate Division confirmed that the most important factor to be considered in issues like custody and access is not the rights of parents but the best interests of the children."[53]

2.4.1 The Best Interests of the Child

The Courts have relied throughout on the test of the "best interests of the child" as the yardstick of determination in matters involving children. Although the line of case law is confused and contradictory, the significance of this principle has never been disputed and has achieved almost a sacredness among judges.[54]

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[52] Docrat v Bhayat 1932 TPD 125
[53] Bonthuys op cit p 623
[54] B v S

The best interests test has been universally recognised and incorporated into the UN Convention on the Rights of the Child 1989 which provides at Article 3(1),

> "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authoritative or legislative bodies, the best interests of the child shall be a primary consideration."

The South African Constitution would later include in the Bill of Rights the stipulation that the child's best interests are of paramount importance in proceedings involving children.[55] Hence in applying this test, the judiciary not only fulfils its obligations in terms of its mandate as the Upper Guardian of all minors[56] but it also acts in accordance with international treaties to which South Africa is a signatory.

The application of the best interests test to cases involving natural fathers was summarised in the most recent case involving the natural father's claim to access as follows,

> "While at common law the father of an illegitimate child, unlike the father of a legitimate child has no right of access, the difference between the respective positions of the two fathers is not one of real substance in practice since in our modern law whether or not access to a minor child is granted to its non-custodian father is dependant not upon the legitimacy or illegitimacy of the child but in each case wholly upon the child's welfare which is the central and constant consideration."[57]

While it may appear that this test is the key to the solution of disputes over parental authority in an objective and fair manner, this appearance is deceptive. The test is by its very nature value-laden, subjective and often collapsible. It is collapsible in that the decision as to the best interests of the child is often

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[55] Section 28 Constitution of South Africa 1996
[56] Rowan v Faifer 1953 2 SA 705 (ED)
[57] T v M 1997 (1) SA 54 AT P 57 par H- I

decided on the stronger parental claim rather than the child's interests, as it is seen as a natural consequence that the child's interests would be best served if the child is in the custody or under the guardianship of the more suitable parent. As will be shown from the long and involved case law, the position of the natural father is defined through the father's struggle to have his parental rights recognised and his efforts to prove that the contact he has with his child does not conflict with the child's best interests.

The facts of each case are significant in the determination of the child's best interests. The courts have purported to scrutinise the individual facts in their decisions. It is submitted that the facts have not been sufficiently examined by the courts in the past and as a result the best interest test has been applied superficially and only lip service has been paid to it. [58]The approach adopted in B v P[59] is to be applauded. In that case the Court clearly placed great emphasis on the facts of the matter. Judge Kirk -Cohen called for further evidence and expert reports as he did not consider himself to be in a position to properly adjudicate the matter without further facts being placed at his disposal.

Boberg has criticised the manner in which the courts have applied the facts of individual cases. He stated that while the courts look at the bonding that has taken place between the father and his child, particularly in applications for access, the courts do not look further to the facts behind the reasons why the child has not bonded with the father. Boberg cautions that there are instances where the single mother has wrongfully restricted the access of the father through reasons of malice and prevented the child from bonding with the father. In these instances then the father would be prevented from enjoying future access on the basis that bonding had not taken place. Boberg writes,[60]

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[59] B v P 1991(4) SA113

> "If a parent can withhold a child from the other parent until the child gets over the loss ...the parent can then argue successfully that it would be detrimental to the child to attempt to re-establish the bond with that parent. The argument would be unaffected by such considerations as whether the parent had acted lawfully in depriving the child of the other parent in the first place, or whether the parent unreasonably refused to facilitate the re-establishment of the bond."

It is also important for the courts to isolate the particular expression of parental authority in dispute so that the factors considered by the court and standard of proof required are adjusted accordingly. Authors Ohannesian and Steyn criticise the judgement of Douglas v Mayer.[61]The authors ascribe the court's refusal in that judgement to grant access to the father to the fact that the court applied a higher standard of proof more appropriate to a custody application. They write that custody, "involves total physical control over the child while access represents but a small encroachment on this physical control."[62] Van Zyl J, in Van Erk v Holmer,[63] quoted this passage with approval and expressed his disapproval of the earlier judgement on that basis.

2.4.2 Custody

Custody over a child represents parental control. It comprises the right and duty to care for a child, to make decisions regarding the child's religion and to have the child live with the custodial parent. The courts have in cases of both legitimate and illegitimate children favoured the mother as custodial parent[64]. This rule has been termed," the maternal preference rule". While this rule is regularly applied in cases involving legitimate children, it is almost slavishly followed in instances of illegitimate children, as displayed in the aforementioned cases of Douglas v Mayers,[65] Docrat v Bhayat[66] *inter alia*.

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[60] Boberg "The Sins of the Father op cit p 38
[61] Ohannesian & Steyn "To see or not to see ?-That is the Question THRHR 1991 p 257
[62] ibid
[63] Van Erk v Holmer op cit
[64] Boberg Law of Parent and Family p 335
[65] Douglas v Mayer op cit

The maternal preference rule was recently described as follows in a divorce judgement, Ex Parte Crichtfield,[67]

> "The contest between a mother and a father for custody of minor children of tender years is rather like the race between the tortoise and the hare, immortalised in Aesop's fables; the unalterable physical fact that it is mothers and mothers alone who must bear the burden of pregnancy has as its consequence by reason of the bonding that this entails and the development of personality even within the womb the giving of a headstart to mothers in any claims upon their relationship with their children and this surely occurs in the ordinary experience of humankind and has been monitored by psychologists."

Yet the Court did later add that just as the tortoise through sheer endurance managed to beat the hare, there are circumstances in which the father proves himself to be more suitable to meet the best interests of the children. The Court as the Upper Guardian of all minors may deprive a mother of her right to custody in appropriate circumstances. However, the courts have held that a natural father is not to be treated differently from any other third parties in a custody dispute.

In earlier cases such as that of Docrat v Bhayat,[68] the father was not granted *locus standi* to apply for custody of his child. In that instance, the parents had been married according to Muslim rites and the mother subsequently passed away. However, these facts were not sufficient to convince the Court that the father had an interest in the custody of the children. In the later case of Rowan v Faifer,[69] however, the Court stated,

> " On these cases it seems that though the father of his bastard child has no rights to its custody, he has *locus standi* to appear. He serves a useful purpose. Through him the

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[66] Docrat v Bhayat op cit
[67] Ex Parte Crichtfield 1999 (3) SA132 at 138 par E
[68] Docrat v Bhayat op cit
[69] Rowan v Faifer 1953 (2) SA705 (ED) at p 710

> merits of the case are investigated, and if the interests of the child lie that way he may be awarded its custody."

Hence while a natural father may stand a chance of gaining custody in these proceedings, by virtue of his marital status and gender, his chances are slim. It has been held to be reasonable that the question of legitimacy is a factor to be considered in the weighing up by the Court of all the relevant factors in order to determine the best interests of the child in custody applications.

Boberg, who often criticised the courts for not properly embracing the rights of fathers, states,[70]

> "It is understandable that, where custody and guardianship are in issue regard should be had to the legitimacy of the parents' relationship."

The fact that the father has not married the mother could be an indicator of the man's level of commitment to the family unit and the child. However this is not always the case and courts should be cautious not to paint all fathers with the same brush. In particular those fathers who are committed to customary unions should be distinguished from those natural fathers who might not participate in the family life of the child. It is respectfully submitted that the courts have erred in the past in not making such a distinction.[71]

Despite the fact that in the case law, married or not, fathers have consistently been denied the same rights to custody as mothers, this branch of parental authority has not been as controversial as the right to access. As, in general, mothers in this country remain the primary caregiver, it stands to reason that the fight over custody is not usually the father's main area of concern.

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[70] Boberg, " The sins of the fathers and the law's retribution" op cit p 38

[71] Docrat v Bhayat op cit, Dhanabakium v Subramanian op cit.

Authors at home and abroad have highlighted the effect that this approach has had, not only on Family Law principles, but on the role of women in society as a whole.[72] Ironically the award of parental power has been held to disempower women. It is opined that the Courts have granted the mother custody automatically on the basis of her gender[73] and by so doing have confined women to that role. The courts reinforce the perception that these gender roles are carved in stone and that they are only to be departed from in the most rare of occasions. Therefore writers such as Sinclair have called for a more uniform approach to the gender roles in disputes involving parental authority.[74]There are however other feminist writers who view the call for identical treatment of men and women to be contrary to women's' interests as will be more fully discussed below.[75]

2.4.3 Guardianship

Guardianship involves the decision making power that a parent has over the child's person and property.[76] Before the case law in this regard is considered it is important to consider the Guardianship Act.[77] The act was passed to amend the Common Law which granted guardianship rights only to the father, to the exclusion of the mother, upon divorce. The Common Law reflected out of the conservative perception that major responsibilities involving the child would be best discharged by the 'man of the house'. The act provides for the power to be held jointly by both parents. This act does not provide for the illegitimate child and once again Parliament neglected to provide clarity on that issue.

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[72] B Hogget op cit, Mosikatsana op cit
[73] J Sinclair 'Family Rights" Rights and Constitutionalism'
[74] ibid
[75] Kindly see Chapter 3.1.2 *infra*
[76] Bronstein in Chaskalson et al op cit par 34.2
[77] 192/1993

In Ex Parte Van Dam, [78] the difference in the position of married and unmarried fathers was evident. In that case a couple had married, bore a child and then divorced. They later reconciled and had more children. As the case took place before the advent of the Guardianship Act 192 of 1993, the Court found that the applicant, as father, had the right to custody over the child born of the marriage. As regards the remaining children, however, the Court conducted a thorough investigation into whether it would be in the children's best interests for the father to be vested with guardianship. The Court in so doing followed the approach adopted in Rowan v Faifer[79] and found that in appropriate circumstances the unwed father could be vested with rights of guardianship.

In Ex Parte Van Dam[80] the Court concluded that it would be appropriate in the circumstances to award guardianship of all the children to the father. It is submitted that the approach adopted in this case was sound. This case is to be emulated as the Court, in judging the illegitimate children's best interests, clearly considered the degree of commitment that the father displayed towards the children and the fact that he was already the guardian of the legitimate child.

2.4.4 Maintenance

It was conclusively established in the decision of Lamb v Sack[81] (which case has been consistently approved in subsequent cases)[82] that an unmarried father has the same duty to support his child as a married father. Both parents are obligated to support their child pro rata according to their economic ability.[83] The natural father's duty is said to arise out of the blood relationship between the father and child and not through any parental authority on the father's part.[84] Hence the

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[78] Ex Parte Van Dam 1973 2 SA182 (W)
[79] Rowan v Faifer
[80] Ex Parte Van Dam op cit
[81] Lamb v Sack 1974 (2) SA 67 (T)
[82] F v L op cit, B v S op cit,
[83] Lamb v Sack op cit
[84] Clark & Van Heerden op cit p 41

claim to parental power based on maintenance obligations has been rejected in the past.[85]

2.4.5 Access

By far the most disputed paternal right has been that of access. This is hardly surprising as access is traditionally the "father's right", a right inherent to the married father and which right he usually confirms on divorce.[86] While the Common Law has made it clear that an unwed father does not have a prima facie right to custody and guardianship, virtual legal chaos has reigned in respect of the natural father's right of access. Boberg writes about this right,[87]

> "But access is not the subject of a contest. It is the booby prize awarded to the loser in the competition for greater rights. It is little enough to give him. Properly exercised it is essential to the child's normal emotional development. And it should not be withheld merely because the parents were not married. "

In earlier cases there was an indication that an automatic right of access vested in the unwed father. In Wilson v Eli[88] the Court appeared to hold that the father was entitled to access on the basis of his maintenance obligation to the child. This approach has been consistently condemned. In F v L,[89] the Court held that it was inappropriate to consider a right of access as a quid pro quo to the duty to maintain. This seems to be the standpoint of most judges and is the correct one based on the best interest test. [90] It is surely always in the child's best interests to be properly maintained but is not always in the child's best interests to have contact with his or her father.

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[85] B v P op cit , F v L op cit
[86] Hahlo And Kahn The South African Law of Marriage
[87] Boberg op cit p 38
[88] Wilson v Eli 1914 WR 34
[89] op cit p 527
[90] B v S op cit, Van Erk v Holmer

The cry of the natural father often heard in the media is that it is not right that he pays maintenance but does not get to see his child.[91] While one can certainly see why the father would find this situation frustrating, it seems somewhat immoral to equate the father's payment of maintenance with his right of access. The child becomes a commodity whose contact is bought. This is not to say that the maintenance of the child by the natural father is not relevant. In the assessment of the child's best interests, a court will have regard to the question as to whether the father makes maintenance contributions as evidence of his commitment to the child.[92]

In the Mathews v Hashrawi[93] judgement, access was awarded to the natural father as of right. However as there was no judicial reasoning behind the decision, the judgement was not considered binding in later cases[94].

In general the cases have followed one of three approaches:

2.4.5.1 The traditional approach

The one stance which has been adopted by the courts, applies a stringent standard whereby the father is required to satisfy the Court that he should be entitled to "encroach upon" and "diminish" the custodial rights of the mother. In Douglas v Mayer, it was stated,[95]

> " The onus is on the applicant, in this case the father to satisfy the Court on the matter and usually the Court will not intervene unless there is some very strong ground compelling it to do so. The standard usually applied by the Court is that used before interfering with the custodial rights of a father of a legitimate child."

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[91] Van Onselen "TUFF-the unmarried fathers fight"1991

[92] In Douglas v Mayers,op cit the Court stated at p 914 F "The fact that the applicant is paying maintenance for the child will also in my view be taken into account."

[93] Mathews v Hashrawi 1937 WLD 110

[94] B v S op cit at p576 B

It is respectfully submitted that the Court erred in this case in a number of ways. Firstly the understanding of access as an encroachment of the mother's custodial right is respectfully, incorrect. The right of access should not detract from the right of custody, the two rights co-exist to enable the child to have contact with both parents. Secondly, The Court adopted an extremely non-interventionist approach to Family Law, the drawbacks of which have been discussed above.[96] Thirdly, the Court required a 'compelling ground' to intervene. This placed an onerous burden on the father, which he was almost certain not to discharge. Fourthly, it failed to differentiate between the process involved in deciding access and that of deciding custody, which, as stated above,[97] is clearly problematic.

Douglas v Mayer [98]was later followed in the subsequent case of F V B.[99] If the stringent standard espoused in these cases is applied, the father is almost certain to be unsuccessful in an access claim.

2.4.5.2 The inherent rights approach

On the other end of the spectrum, Judge Van Zyl departed from these decisions and created controversy by delivering his decision in Van Erk v Holmer.[100] The Court recognised that there was a shortage of legal authority in disputes involving the access rights of the unwed father and as a solution, Van Zyl J appealed to principles of justice and equity to build on the existent law. He quoted authors Ohannesian, Steyn and Boberg as authority for the proposition

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[95] Douglas v Mayers op cit 914 E
[96] Please see Chapter 2.3.1 *supra*
[97] Kindly see Chapter 2.4.1
[98] op cit
[99] F v B 1988 (3)SA948 (D)
[100] Van Erk v Holmer op cit

that the time was ripe for courts to keep with modern thinking and for the courts to relax their stance on unwed fathers.[101]

> "I believe that the time has indeed arrived for the recognition by our Courts of an inherent right of access by a natural father to his illegitimate child. That such right should be recognised is amply justified by the precepts of justice, equity and reasonableness and by the demands of public policy."

This decision caused a stir in the legal community, not only because the Court quoted from glossy magazines such as 'Fair Lady' but also because it flew in the face of long decided authority. The case ignored binding authority and the principle of *stare decisis* by turning away from *inter alia*, the F v L[102]decision. While the Court's attempts to meet the changing needs of society are to be applauded, this decision predates the Constitution and as such the Court's reliance on principles of justice and equity were, it is submitted, out of place.

The South African Common Law prescribes a strict hierarchy of legal authority, which the Court blatantly disregarded. The Court did support its decision on the basis that a legal lacuna calls for the reliance on principles of equity. However, while there are confused elements of the law relating to natural fathers, the F v L[103] decision clearly lays down that a natural father has no inherent right of access to his child. The Courts procedural departure was not the only to attract criticism. Substantively, the move in favour of the father was criticised as being too father - centred and of losing sight of the child's best interests. Authors such as Clark[104]caution,

> "The Courts should always have regard to the practical aspects of access and any positive benefit that would accrue to the child. Factors such as the possible destabilisation

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[101] Van Erk v Holmer op cit at p 650
[102] F v L op cit
[103] F v L op cit
[104] Clark, " Should the Unmarried father have an inherent access to his child?"565-569

> of a child's new family unit by a biological father who had hitherto taken no interest in a child should not be downplayed. The circumstances of birth outside marriage vary greatly. Fears of violence and other forms of intimidation or interference cannot be disregarded. To bestow an inherent right of access on a father who has maintained no relationship with the mother and child and who has made no effort either to voluntarily acknowledge paternity or to discharge his obligations thereto, is, in my view, to place the interests of an unmarried father above the welfare of the child."

It is submitted that the criticism of Clark is valid. The Court had quoted the article of Boberg, which seems to be written from the father's perspective Despite Boberg paying lip service to the 'best interest' principle, it is respectfully submitted that his argument falls foul thereof. One of the quoted extracts stated,

> "If a man is sufficiently concerned to seek to establish his paternity of a child despite his concomitant duty of support in order to enjoy access to that child, the law should claw the (perhaps tenuous) authorities to affirm the right of access rather than being astute to deny it."

This attitude is to be discouraged as it returns to the quid pro quo approach, which seeks to reward a father with access. It is inappropriate to accord a father a right in this manner without considering the effect that it would have on the child. It is not sufficient to show that a father recognises his paternity for him to be awarded access.

This is not to say that the Van Erk[105] decision is without merit, as not only did it bring the plight of the unmarried father into the centre stage of legal commentary but it also provided a useful counter balance to the precedent which leans so strongly towards the exclusive parenting role of the mother in cases concerning extra-marital children. It also challenged the role of the judiciary in Family Law and bravely rebelled against the traditional non-interventionist legacy in South Africa. Unfortunately the result was that the Court appears to have over

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[105] Van Erk v Holmer op cit

compensated for the possible injustices of past precedent by adopting a maverick stance based on very scarce authority.

2.4.5.3 The intermediate approach

In 1995, the Appellate Division confirmed the via media between the two extremes outlined above. In B v S,[106] Judge Howie correctly applied the best interest principle. While he confirmed the judgements of F v L[107] and B v P,[108] he rejected Van Erk v Holmer (supra) on a number of grounds, including the fact that Van Zyl J ignored binding authority. Howie J stated that Van Zyl J exceeded his judicial function by effectively assuming the role of the legislature in making law. Howie J held that a father did not have an inherent right of access but that he was entitled to access if he could prove that it was in the best interests of the child.[109]

Howie J set out in great detail the factors to be considered in determining the question of whether access would be in the child's best interests. He relied on English authority and pronounced that the Court would consider, "the degree of commitment which the father has shown towards the child, the degree of attachment which exists between the father and the child, the reason of the father for applying for the order." The Court went on to state, correctly it is submitted, that in applying these principles it would be in keeping with the South African Law Commission Report on A Father's Right in Respect of his Illegitimate Child.

The most recent case involving access, T v M,[110]which emanated from the Appellate Division, was decided shortly before the Fraser[111] decision. The Court

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[106] B v S op cit ,
[107] F v L op cit
[108] B v P op cit
[109] B v S op cit at p p579 par F-I
[110] T v M 1997(1)SA 54

followed the B v S[112] decision very closely and applied the tests formulated by Judge Howie.

The Court is to be commended for upholding the rights of children and developing the law to the extent that it conforms to international trends. The Court declared at p 57 par I,

> " ..(I)t is the right or entitlement of the child to have access or to be spared access, that determines whether contact with the non-custodian parent will be granted." [113]

Here the Court correctly focuses on the child's right of access to his or her father and not vice versa. This reflects the move away from parental rights towards parental responsibilities, which is evident in academic writings and many foreign jurisdictions. In that case the Court found that in principle there was no reason why contact should not be maintained between the natural father and his daughter. However, as over two years had elapsed since the matter was heard at the Court *a quo*, Judge Scott held that the matter was to be referred for the hearing of further evidence.[114] The Court confirmed the B v S[115] decision and emphasised that the facts of the case were to form the focus of the matter.

The intermediate approach adopted in the B v S [116]and subsequently followed in the T v M [117]decision has provided the most workable solution. It will be shown below that the Natural Fathers of Children Born out of Wedlock Act 86 of 1997 provides a very similar answer to this vexed question. While legal practitioners might have wished for a decision which would eliminate some of the uncertainties which have been passed down through the conflicting precedent,

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[111] Fraser op cit
[112] B v S op cit
[113] T v M op cit p 57 par I
[114] T v M op cit p 60
[115] B v S op cit
[116] ibid
[117] T v M op cit

the Court addressed this by calling upon Parliament to effect legislation to this aim.[118]

2.4.6 Adoption

A natural father's consent was not required in the adoption proceedings of an extra-marital child.[119]In terms of the Child Care Act 74 of 1983, in cases where the child was legitimate, the consent of both parents was required. However where the child was born out of wedlock, only the consent of the mother was required. Further it was not a requirement in the act that the natural father receive notice of the adoption proceedings.[120] It was commented by Clark and Van Heerden that the father could join the proceedings to the adoption through regulation 4(2) of the above act which provides that any party with an interest in the proceedings might approach the Court to be heard.[121] However, in practice this was seldom the case, especially as the father was often ignorant of the proceedings.

It was suggested in the case of W v S[122] that the Courts would in all probability rule it to be in the interests of the child to give the father notification of such proceedings.[123] However, the Court did not rule decisively either way and once again the question of the natural father's legal role was skirted. It is submitted that the law in relation to adoption proceedings disregarded the natural father to an extent, which could not be justified. This Section placed the father in an iniquitous position. In addition the interests of the child were not served in instances where the father was denied the opportunity of having his claims in adoption proceedings heard.

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[118] T v M op cit p579 par J
[119] S 18(4)d Child Care Act 74 of 1983
[120] Clark and Van Heerden op cit p 42
[121] ibid
[122] W v S 1988 (1) SA 475
[123] W v S op cit at p 496

3. THE POSITION FROM 1997 TO THE PRESENT.

3.1 The Fraser Judgements

The above case has captured the attention of the South African public. While the phrase, the 'Fraser judgement' has become a household term, it would be more appropriate to speak of the Fraser judgements as the saga has played itself out before no less than five courtrooms. The central figures involved in the human drama were the natural father, Fraser and his former lover, Naude. Naude fell pregnant with their child and soon afterwards their relationship ended. Naude made the decision while still pregnant to have her child adopted. Fraser however wished to keep the child and expressed his opposition to the adoption. This would spell the beginning of five long years of court battles waged by Fraser (and ultimately an alleged kidnapping attempt) to fight the adoption.

Fraser first approached the Witwatersrand Local Division while Naude was still pregnant for an interdict preventing the adoption.[124] The Court denied him this relief on the basis that he had not displayed a prima facie right arising from statute or Common Law to substantiate his claim. The child, Timothy was born and the adoption proceedings began. Fraser then wrote to the Minister of Justice requesting him to instruct the Commissioner of Child Welfare to grant him the right to oppose the adoption proceedings in the Children's Court. The Minister responded as follows,[125]

> "Despite the current legal position, the minister respects the rights of parents and children enshrined in our Constitution and in pursuance thereof believes that your client should at least be afforded the opportunity to be heard by the relevant Commissioner."

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[124] Fraser v Naude 1997 (2) SA 82 (W)

[125] Fraser v Childrens Court Pretoria North 1997 (2) SA 218 (T)at p 221F

As stated above the consent of the Natural Father was not required in adoption proceedings and as a consequence thereof, Fraser's opposition to the adoption was not considered by the Court to be an obstacle to the adoption. Fraser had endeavoured to substantiate his rights as father at the adoption proceedings He further alleged that the adoption would not be in the child's best interests. The Children's Court considered the request for the recognition of such rights by referring to the best interests of the child and to the English case Re H[126] which was approved in B v S.[127]

The Court applied the same three factors approved in those cases to determine the existence of a right on the part of the father to prevent the adoption and the best interests of the child[128]. The first factor is the degree of commitment, which the father has showed towards the child. The second is the degree of attachment between the father and the child. The Court found that Fraser had succeeded on these two tests. However the third factor considered is the applicant's reason for applying for the relief and on this ground Fraser failed.

The Court's decision in this regard was summarised as follows,[129]

> " The Commissioner held that the applicant was not really concerned with the suitability of the adoptive parents but rather with an attempt to gain custody and parental authority for himself."

Fraser further demanded that the Court refer the matter to the Constitutional Court. He asked that the matter be referred for viva voce evidence and he launched a counter- application for adoption. As Preiss J stated in the subsequent review proceedings, [130]

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[126] Re H and another [1991]2 ALL ER 185
[127] op cit at p 583
[128] Fraser v Childrens Court op cit p 223
[129] Fraser v Childrens Court op cit p 224 at par A-E
[130] op cit at p 222 par D

> "The applicant was relying upon every conceivable legal step in order to contest the proposed adoption."

Despite the Minister's pledge of support and the concerted efforts of Fraser, the adoption was approved by the Children's Court Pretoria in February 1995. Fraser then brought an urgent application reviewing the decision of the Children's Court. Much of his argument rested on principles of Administrative Law as he wished to have the Commissioner's decision set aside on the basis that he was not afforded a fair hearing in terms of the *audi alteram partem* rule.[131]Fraser further claimed in his application an order declaring the relevant provisions of the Act invalid insofar as they conflict with the Constitution.

The matter came before Judge Preiss. The Court focused on Regulation 4 (1) of the Child Care Act,[132]

> "a parent ...of a child in respect of whom a children's court holds an inquiry...shall have the same rights and powers as a party to a civil action in a magistrates court in respect of the examination of witnesses, the production of evidence etc. "

Although it was argued against Fraser that he did not fall under the term "parent" because he was not married to Naude, the Court (correctly it is submitted) rejected this interpretation and held that he was a 'parent' for the purposes of the Child Care Act.[133] The Court concluded that Fraser had not been afforded these rights and powers in that his request for viva voce evidence had been denied. The Court found that the denial of such rights amounted to a gross irregularity and consequently set the adoption procedure aside.

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[131] Fraser v Childrens Court Pretoria North op cit
[132] Child Care Act 74 of 1983
[133] 74 of 1983

The Court then did not have to decide whether the section offended against the Constitution and whether it was invalid. However Judge Preiss held that this was a matter which should be referred to the Constitutional Court.

3.1.1 The Constitutional Court Decision

The matter then came before the then Judge Mahomed, Deputy President of the Constitutional Court. The Court considered whether Section 18(4) d violated the right to equality in terms of sections 8 (1) and 8(2) of the Constitution. While S8(1) guarantees the right to each person to equal treatment before the law and equal protection by the law, S8(2) entrenches the right not to be unfairly discriminated on any one of the listed grounds. [134]While legal commentators are uncertain whether these grounds form a *numerus clausus*,[135] the grounds form a rather exhaustive list, and include inter alia; race, gender, sex, ethnic or social origin ...religion, conscience, belief, culture or language.

The Court went on to acknowledge that as significant as the right is that there are circumstances under which it might be limited through the application of the limitation clause, the then Section 33 of the Interim Constitution. The Court ultimately found that S18(4)d 'offends' the equality clause. This conclusion was founded on three different grounds of discrimination.

Firstly, it was held that the section discriminated against certain fathers who had solemnised their union with the mother according to custom. The judge focused on the status of Islamic marriages. He noted that as a result of the fact that these unions are not accorded any recognition in South African Law that the father of a child born of such a union would not be required to consent to the adoption of his child. These unions were distinguished from unions solemnised in terms of African Customary Law which had been accorded limited legal recognition in

[134] S8(2) states "No person shall be unfairly discriminated against; directly or indirectly...on one or more of the following grounds..."

terms of the Black Administration Act 38 of 1927. The effect of that act was that such a union was deemed a marriage for the purposes of the Child Care Act[136] and the consent of the father was thus required. The distinction between these unions was held to be discriminatory and could not be justified in terms of the limitation clause. The Court stated in response thereto,[137]

> "This invasion of section 8 of the Constitution is in my view clearly not reasonable and not justifiable in an open and democratic society based on freedom and equality."

Mahomed DP then considered the second ground, discrimination on the basis of gender and commented,

> "The attack on the impugned section based on gender discrimination is that the only difference between the mother and father of a child born in consequence of a relationship not formalised through marriage is the difference in genders."[138]

The judge considered whether there could be a justifiable reason for a distinction on the basis of gender and displayed an attitude of caution in this regard. Mahomed DP did not make a bold statement and suggest that there were no circumstances under which such a distinction was permissible. In fact he acknowledged that there were instances in which such a distinction could be justified. However he considered whether the section was so broad as to introduce distinctions which would not be justifiable. While the Court did not expressly state how it arrived at the conclusion that the discrimination could not be upheld through a reliance on the limitation clause, it is clear that the court applied the principles of proportionality.

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[135] Chaskalson et al op cit par
[136] 74 of 1983
[137] op cit p 273 at par F
[138] ibid

South African Courts have followed the Canadian approach first espoused in Regina v Oakes,[139] which was approved in Quozeleni v Minister of Law and Order.[140]This test lays down that once it has been established that a right has been infringed it must then be asked if that infringement is rationally connected to a Government objective. The Government aim must be important enough to warrant a departure from a right. The impairment must limit the right to the least extent possible, in a manner proportionate to the objective.[141]This would mean that the end to which the restriction is designed would have to be compelling and the means employed to reach them, fitting.

In the Fraser[142] judgement the Court recognised an infringement of the right not to be discriminated against unfairly. The Court acknowledged that there might be rationality to a distinction in the initial phase after the child is born as the mother has a biological connection with the child. However this rationality does not extend beyond the first year or so after the child is born. As the unwed father's consent is not required regardless of the age of the child placed for adoption and surrounding circumstances, it cannot be said that the limitation is rational. There is no provision for circumstances when the father is actively involved in the child's upbringing and for instances when the mother is an absentee parent. S18 (4)d does not serve to achieve an important purpose, nor is it well tailored to effect a specific end.[143]

The third attack on the section was based on the discrimination between married and unmarried fathers. The Court recognised the need for laws which protect the sanctity of the marriage institution and postulated that there might be circumstances where it would be appropriate to distinguish between persons on that ground. The Court considered the possible results of a provision, whereby

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[139] [1986]1 SCR 103,26 DLR (4TH)200
[140] Quozeleni v Minister of Law and Order 1994(3) SA625 (E)
[141] Chaskalson et al par 12.1.c
[142] op cit

an involved father who had not been married to the child's mother would be arbitrarily excluded from having a say at the proceedings, while a married father who had shown no interest in the child would be consulted. On that basis it was held that the distinction was untenable.

The Court went on to consider the alternative to the offending provision and cautioned that the requirement of the consent of all unmarried fathers on a blanket rule could have undesirable results. [144]The judge referred specifically to instances where the child was conceived out of rape and/or incest. The Court concluded that there are so many anomalous results which could be caused by rigid regulation which either accords a general 'veto right' to all fathers or which denies all fathers any say in the matter. The Court acknowledged the weighty task awaiting Parliament in providing for the myriad of possibilities. The Court therefore called for entirely new legislation in the matter and not simply a rectification of the impugned section and stated,[145]

> "It is in the interests of Justice and good Government that there would be proper legislation to regulate the rights of parents in relation to the adoption of any child born out of a relationship between them which has not been formalised by marriage."

3.1.2 Commentary on the Constitutional Judgement

Before the relevance of the above case is considered, it is important to consider the possible reasons behind the reluctance on the part of the South African judiciary to pronounce on the position of unwed fathers in the past. The traditional view regarding divided gender roles has already received extensive discussion above. One of the other reasons for such reluctance offered by Boberg [146]was that in acknowledging these rights, the Court might be seen to be condoning extra- marital sex and perhaps even encouraging such behaviour.

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[143] Fraser v Childrens Court Pretoria North 1997 (2) SA 261 (CC)
[144] op cit p 275
[145] op cit p284 par A

Further the judges were wary of what they considered to be an undermining of the institution of marriage and the encouragement of cohabitation. As the ruling power in South Africa was traditionally conservative, it is not surprising that such views were held by the judiciary.

In many of the judgements the facts were that the mother had subsequently married a third party and as such wished the step-father to assume the paternal role. As the Courts were so intent on upholding "family values", there were many decisions which deprived fathers of access rights in a bid to integrate the new family.[147]The best interests of the child were then determined according to a narrow understanding of the family unit, where the married mother and father figures were to be regarded as the most appropriate care givers often to the detriment of the natural father -child relationship. Today the concept of family has been changing allowing a broader understanding of the term but so too has the role of the judiciary. These changes combined with the introduction of a constitutional age has led to definite development in this area.

The Court is to be lauded for taking a bold stand and pronouncing, not only on the role of the natural father but on the application of the Right to equality. The Court did not hesitate to advocate certain societal values to be protected and fostered by Government. The Court in so doing moved away from the non-interventionist approach so often adopted in the past.

In this case the Court incorporated principles of public policy and appealed to social realities without ousting basic legal principles as Van Zyl J had done in the aforementioned judgement of Van Erk v Holmer.[148]However in order to compare these judgements it is important to note the different contexts within which they

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[146] Boberg "Sins of the Fathers.The law's retribution" Op cit p 36
[147] F v L op cit, B v P op cit
[148] op cit

were declared. Although the two judgements were passed within five years of each other, the earlier was decided before the advent of the Constitution.

The later judgement reveals more than a changed perspective on the position of the unwed father, it highlights the changed role of the courts. The courts have been empowered to review and reform laws in order that they be consistent with changed social values. The Fraser Judgement was concerned with the application of the value of equality between persons. This value has been hailed as the core value underpinning the entire Constitution. The Court recognised the significance of the right to equality and stated,[149]

> "There can be no doubt that the guarantee of equality lies at the very heart of the Constitution. It permeates and defines the very ethos upon which the Constitution is premised."

As the Constitutional Court is based upon a set of Fundamental Rights, it is capable of upholding certain norms and morals. Mahomed DP appropriately then applied a value judgement. However it is submitted that Van Zyl J confused public opinion with such core values.

The Court in S v Makwanyane [150]warns against the forming of a decision based on public opinion. First it cautions that most sources of public opinion are difficult to substantiate. Van Zyl seemed to rely on opinion reflected in magazine articles which is not necessarily reflective of public opinion. The Court then states that a court should not to rule so as to gain public favour. Otherwise the Court may be inclined to disregard the claims of marginalised social groups. Public opinion was found to be an issue to be assessed by Parliament and not by the Judiciary.[151]

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[149] Fraser op cit at p 272 parA
[150] S v Makwanyane 1995 (6) BCLR 665(CC)
[151] ibid

In an assessment of a South African Constitutional Court decision it is usual to refer to the Canadian precedent. As our Bill of Rights is modelled to a large extent on the Canadian Charter of Rights, it is useful to gain from their experience in applying these rights. In that instance Mahomed DP looked to the leading Canadian case on point, Re Macvicar and Superintendent Family and Child Services[152]for guidance.

The facts of that case were similar to the Fraser judgement. A British Columbian statute, The Adoption Act, had dispensed with the consent of a natural father in adoption proceedings. This statute was challenged by a natural father on the grounds that it denied him the right to equality enshrined in the Charter.

The father alleged that he was discriminated against on the basis of gender and on the basis of marital status. The Court looked at the Adoption Act and applied the proportionality test to assess whether the ostensible differentiation might be justifiable. The Court concluded that the biological differences between genders could not justify such a discrimination particularly as,[153]

> "The Act itself recognises that sex is irrelevant because included in those who must consent are males who have married the mother."

It was held that the distinctions were a violation of the natural father's right to equality. It was held further that it was in the best interests of the child that the father is required to consent so that the natural bonds that a child has with his or her parents are not easily severed.[154]

As the rights of the child did not receive attention in the Fraser judgement, it is interesting to note the argument in the Canadian case. It was argued that it was

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[152] 1986 34 DLR (4th) 488
[153] op cit p 496
[154] op cit p 494

in the best interests of the child that the adoption proceedings are dealt with speedily and that the natural fathers' consent should be dispensed with. This argument was rejected by the Court. The Court held that the parent is best placed to decide on the adoption of his or her child. The Court held further that while parental rights are secondary to that of children's that they do still exist.[155] It is averred that the Court applied the rights of both parents and children correctly in this instance.

It is submitted that as the South African limitation clause is similar to the Canadian example that it is fair to rely on that precedent. The correctness of the Fraser judgement[156] is therefore reinforced by the Re MacVicar [157]decision.

While the judgement of the Constitutional Court has received praise from various commentators, it has also attracted criticism. As Mahomed DP held that there were instances in which the roles of men and women could validly be distinguished, the Court was criticised in not going far enough in pronouncing on gender inequality. Sinclair had raised concerns about notions of parenthood and their effect on the role of women in society. She opined that until notions of gender roles changed whereby unwed fathers would be granted equal parental authority, that women would continue to be subordinated.[158]

Mahomed DP has taken a different standpoint in his judgement. He recognised that women are still the primary care-givers and considered the hardships that might be suffered by single mothers were natural fathers to be treated identically to them in law. In so doing he applied a substantive interpretation to the right of equality.

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[155] op cit p 494
[156] Fraser v Children's Court Pretoria North 1997 (2) SA 261(CC)
[157] Re MacVicar op cit
[158] Sinclair op cit p 539

Constitutional writers seem to agree in general that the content of Section 14 of the Final Constitution and Section 8 of the Interim Constitution is substantive, as Kentridge J stated,[159]

> "A formal approach to equality assumes that inequality is aberrant and that it can be eradicated simply by treating all individuals in exactly the same way. A substantive approach to equality on the other hand does not presuppose a social order It accepts the past patterns of discrimination have left their scars upon the present. Treating all persons in a formally equal way now is not going to change the patterns of the past, or that inequality needs to be redressed and not simply removed."

The interpretation of the equality clause, as suggested in this extract has been purposive and further evidence of the fact that the right is not formal in nature is the extensive affirmative action provision, which is, provided in Section 8 (3). A formal notion of equality is usually inconsistent with a programme of affirmative action. This is because a formal right to equality vests in the individual and may not be departed from for the upliftment of the group. The formal notion is more suited to individualist western liberal democracies such as the United States where there is less emphasis on social design and more on equality of opportunity for each person. Our Constitution on the other hand emphasises upliftment of groups.[160]

In the Fraser case then it is submitted that the court did not detract from the rights of women. As Cockrell stated,[161]

> "It is submitted that in the standard scenario, where the mother and father of an extra-marital child live apart and the child lives with the mother, the existing common-law rule which regards the mother as the natural guardian to the exclusion of the father is justified

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[159] Kentridge "Equality" in Chaskalson et al op cit par 14.4
[160] ibid
[161] Cockrell A as quoted in Bronstein op cit p 34.7

> by deep notions of substantive equality and should not be held to be in violation of the father's constitutional right to equality".

This approach has been endorsed by the Constitutional Court in a number of decisions regarding the right of equality. President of the Republic of South Africa v Hugo[162] is a Constitutional Court decision which was reported in the same year as the Fraser[163] judgement. Like the Fraser [164] case it centred on the question of gender equality. The facts of that case were briefly that the President was considering releasing certain prisoners who were mothers of children under the age of twelve. This act was challenged on the basis that it discriminated on grounds of gender. Significantly, Judge O' Regan in her majority decision looked at the State's reasoning for differentiating between mothers and fathers on the basis of gender. In order to establish whether the differentiation was unlawful in terms of Section 8, she focused on the wording of S 8(2) and more particularly on the term "unfairly discriminated".

The Court stated at para 41,

> "We need to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case will therefore require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which further the constitutional goal of equality or not." [165]

This excerpt confirms that the Equality Clause is goal orientated and as such is substantive in nature.

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[162] President of the Republic of South Africa v Hugo 1997 (4) SA1 CC
[163] Fraser v Children's Court Pretoria North op cit
[164] ibid

This understanding is borne out by the wording of Section 8(2). As S 8(2) outlaws only discrimination which is unfair it stands to reason that some forms of discrimination were envisaged by the drafters to be fair.

This appears to be the approach adopted by Mahomed DP as he considered the factors relevant to both the position of both the single mother and single father in society and he based his decision on the effect that the alleged discrimination would have on both. He was mindful of the disadvantages suffered by fathers in terms of the legislation while at the same time was sympathetic to the socio-economic plight of single mothers.

It would appear that while some feminist writers have demanded a changed notion of family roles, the Court has gone further by considering the practical needs and best interests of those mothers and children who would be most affected by legislation in this regard. While some commentators might criticise Mahomed for discriminating between the genders by not applying the Aristotlean concept of equality whereby all people are to be treated equally, it is submitted that his interpretation of the content of the equality clause is the correct one.

Another criticism levelled at the court was that the decision was taken from a stance which favoured the interests of the parent over those of the child. A recent commentary by Mosikatsana states,[166]

> "The Constitutional Court decision in Fraser was parent-centred. It addressed only the competing property interests that the natural parents had in their child. Mahomed DP did not factor the child's best interests in the equation of competing parental rights, whereas s 28(2) of the Constitution by the Republic of South Africa, Act 108 of 1996, instructs us that '[a] child's best interests are of paramount importance in every matter concerning the child'."

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[165] President of the Republic of South Africa v Hugo op cit par 41.1

[166] Mosikatsana, "Law of Persons and Family Law" Annual Survey of S A Law p 154

The relevant portions of Section 28 state,

> "Children
>
> (1) Every Child has the right -
> (b) to family care or parental care ...
>
> (2) A child's best interests are of paramount importance in every matter concerning the child"

This section confirms the supremacy of the best interest test but at the same time stipulates that children are entitled to parental care. This right then clearly 'trumps' a father's parental right. It will be interesting to see whether the Constitutional Court will include the right of access as an element of parental care. If so then the child would have a fundamental right to have contact with his parents, subject to the best interest consideration.

While it is noteworthy that nowhere in the judgement is there mention of the rights of the child enshrined in the Constitution, it would appear that the Court is not completely to blame for the apparent oversight. Nowhere has it been recorded in the judgement that this was a right relied upon by any party to the dispute. The neglect of the section dealing with the rights of the child therefore runs far deeper than this judgement. The attack made by Mosikatsana should be levelled at not only at the Courts but at South African Family Law jurisprudence as a whole. Other jurisdictions have moved away from the concept of 'parental rights' and speak more in terms of 'parental duties'[167]owed to the child. South Africa has certainly shown a move in this direction through the Appellate Division judgement of B v S[168] and the incorporation of Section 28 into the Final

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[167] Cretney SM & Masson JM Principles of Family Law p 638
[168] B v S op cit

Constitution. However our jurisprudence would have to break away from the Roman Dutch concept and terminology of 'parental power' to effect this shift.

It is disappointing that Mahomed DP did not embrace the powers he had as Constitutional Court Judge to pronounce more boldly on the legal status of customary unions. He compares the disadvantaged position of the Islamic union with that of the African Customary union. This seems an unsatisfactory approach and it is unclear why it was necessary to speak in relative terms altogether. It is unclear why these unions should continue to suffer unfair discrimination at all.

There are writers who fear that the recognition of these unions will conflict with the values of the Constitution. Their reasoning is that some customary legal systems have elements of patriarchy and paternalism, which tend to subjugate women.[169] This does not seem sufficient cause for the Law to turn a blind eye to these unions.

Firstly the parties to these unions are vested with the right to Freedom of Religion, Belief and Conscience.[170] Secondly if these unions were recognised then at least they would be subject to Civil Law regulations, which have, mechanisms designed to protect women. At present a woman party to an Islamic union cannot rely on maintenance laws, laws of intestate succession and Motor Vehicle Accident Legislation. Thirdly, the fact that African Customary unions have been recognised in recent legislation means that it is possible for Parliament to accord these unions validity without derogating from women's rights.

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[169] Sinclair op cit p 561
[170] Section 30 Final Constitution

In all the Fraser judgement[171] is a considered and equitable decision. The Court is to be commended for providing for the wide spectrum of people who would come to be affected by such a decision. While Lawrie Fraser himself did not benefit personally in that his child was not removed from his adopted parents, it altered the position of the natural father immeasurably.[172]

3.2 Legislative Development

3.2.1 The South African Law Commission Report on the Rights of a Father in respect of his Illegitimate Child

The Natural Fathers Act [173]was based very firmly on the SALC Report published in 1994.[174] The report comprised a thorough investigation by leading legal practitioners and academics.

> "The Commission considers in this report the question whether the Common Law position as it applies at present according to which the mother of an illegitimate child has exclusive rights such as guardianship, custody and access requires reform."[175]

The Commission considered the prevailing Common Law, Customary Law and Foreign legal systems. The leading academic writings on the topic then received close attention. Based on these materials and various discussions the Commission produced two options for future legislation and invited comments from the legal fraternity as to which option was preferable.

The first option recommended that the parental power remain vested in the mother but that the father be granted leave to apply to the High Court for an

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[171] Fraser v Childrens Court Pretoria North 1997 (2) SA 261

[172] In the 1999 reported decision of Naude v Fraser 1998 (8)BCLR 945(SCA), the judgement of Preiss J was overturned by the Supreme Court of Appeal. The validity of the adoption proceedings conducted by the Pretoria Children's Court was upheld.

[173] 86 of 1997

[174] SALC Report on the Rights of a father in respect of his illegitimate Child 1994

[175] op cit at par 1.10

order granting him, custody, guardianship and /or access to his child.[176]The SALC then recommended further that in instances where guardianship or custody was to be awarded to someone other than the mother or where the child was placed for adoption that the father be granted preferential rights in respect of the child. The proposal recommended that natural fathers be notified of pending adoption proceedings so that he might have an opportunity to lodge an adoption application.[177]

This option does not make great inroads into the Common Law position. It confirms mainstream judicial reasoning of F v L[178] and B v P.[179]It does this by resting the onus on the father to apply for parental rights. It is significant that the Commission has clarified that the father is in a preferential position to other third parties in respect of his child and as such lays to rest the problematic decisions of Docrat[180] and Douglas[181] where the father was considered a legal stranger to the child.

This option continued to include the various factors which were to be considered by the courts in evaluating an application by the father for rights of access. These focused on the relationship between the mother and the natural father, the relationship of the child to each parent or to another person, the effect that separating the child from either parent from the mother or natural father or another person might have on the child and the child's attitude to the possible access. Interestingly these enquiries were only proposed in respect of applications for access. It is unclear whether they were to apply in respect of the claims for custody and guardianship. The list was to assist the courts in

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[176] SALC Report op cit par 7.3
[177] ibid
[178] F v L op cit
[179] B v P op cit
[180] Docrat v Bhayat op cit
[181] Douglas v Mayer op cit

assessing the best interests of the child which was ultimately to be the determining factor.

The second option granted an inherent right of access to the father, thereby imposing an onus on the mother to approach Court to object to the father exercising access. The latter option proposed the same procedure as the first in respect of custody and guardianship. This option stipulated that the father should be given notice of pending adoption proceedings and that he should receive a fair hearing.[182]

The latter option seems to conform more to the Van Erk[183] judgement and is a clear departure from the traditional standpoint. The rights of the father are advanced in this proposal both in respect of his rights to access and in respect of adoption proceedings.

The comments received by the Commission indicated that there was equal support for both propositions.[184] The SALC ultimately supported the first option and in so doing followed the intermediate approach discussed above. The main reason for this choice seemed to be a concern for the women, usually single mothers, who would have to bear the financial burden of litigating. The SALC was conscious that as a class these women are already disadvantaged and often are not capable of bearing these costs.[185]

Interestingly this concern was raised by academics, specifically Clark and Van Heerden[186] who were against granting a father an inherent right of access

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[182] SALC Report op cit par 7.3
[183] Van Erk v Holmer op cit
[184] SALC Report op cit par 8 .4
[185] ibid
[186] Clark and Van Hererden op cit p56

because they doubted whether litigation would be accessible to women. Van Zyl J attacked the opinion of Clark and Van Heerden in Van Erk[187] where he asked,

> "Why should it be any more difficult for the mother to approach the Court than it is for the father?" [188]

It is submitted that this question is naïve and in fact easily answerable. A contested High Court application of this nature could cost the applicant anywhere from R20 000.00 upwards in attorneys' fees and disbursements. Even if the applicant is granted a cost award in her favour, most attorneys firms would demand a sizeable deposit from their client before embarking on such litigation. Although the Commission postulated that these matters might be heard at the Magistrates Courts, this has not been the case.[189] It is common cause that single mothers, generally speaking, do not receive an income close to, or equal to that of single fathers. Hence it is more difficult for them to approach the Court for relief. It is submitted that the reasoning of the SALC is therefore convincing and that the first proposal provides a more realistic blue print for regulation in this regard.

The Commission stated,[190]

> "The Bill confirms for the most part the Common Law position but seeks to effect legal certainty and to establish guidelines on the basis of which the courts may settle disputes of this nature."

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[187] Van Erk v Holmer op cit

[188] op cit at p 649

[189] Although the Southern Divorce Court has been set up in Cape Town Magistrates Court as of January 1999, the Registrar of that Court informed me telephonically that that Court was only hearing matters which have arisen out of marriage and as such would not entertain applications relating to extra-marital children.

[190] SALC op cit par 8.19

Hence it is clear that the changes proposed were not aimed at a remodelling of the legal system but rather on the laying down of procedure whereby the father's rights might be evaluated and established.

3.2.2 The Natural Fathers Act

Although the Commission report was published in 1994, the act was assented to in November 1997, a few months after the delivery of the Fraser judgement.[191] It has been commented that the eventual passing of the Act was as a consequence of the heightened public pressure which existed in the wake of the case. [192]

The preamble to the act includes as its purposes the following,[193]

> "To make provision for the possibility of access to and custody and guardianship of children born out of wedlock by their Natural Fathers, ...to provide for the notification of Natural Fathers of any intended adoption of their children born out of wedlock."

It is interesting to note that all the act can provide for is the "possibility" of access, custody and guardianship. It is then clear from the outset that the act speaks in guarded terms about paternal rights.

The act goes on to define the term, "child born out of wedlock'" and maintains the Common Law position by stating,

> "a child whose natural parents were not married to each other at the time of such child's conception or at any time thereafter."

Section 2 of the act is headed, "access to and custody and guardianship of children born out of wedlock by natural fathers." This provision follows the SALC report very closely and stipulates that the father may make application to Court for an order granting him access, custody and guardianship on conditions to be

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[191] Fraser v Childrens Court Pretoria North 1997(2)SA 261(CC)
[192] Bronstein op cit par 34.3

determined by the Court. The Court is again to be guided by the best interests of the child at all times. The statute then goes on to compile a list which the Court is to consider in making such a determination.[194]

This list includes those factors suggested by the SALC. It qualifies the enquiry into the relationship between the mother and father by directing that the Court is to pay special attention to whether there is a history of violence or abuse in the relationship or towards the child. This would appear to be a factor aimed at addressing the very real social issues facing many women and children in South Africa and of vital importance in assessing the future welfare of children in such a relationship.

The act goes further than the report and adds the following to the list of factors; the degree of commitment the father has shown towards the child, (evinced through maintenance payments or the bearing of any birth costs) and the fact that the child was born of a customary or religious union. The child's attitude to the granting of an order is also considered.

As the long awaited statutory guideline to a natural father's claim to parental authority, the act, like the report which preceded it, did not seem to make a marked change to the Common Law. However, one must be cautious not to be overly critical as, as already stated, there are many socio-economic realities which dictate that a drastic change could well endanger the welfare of the children and unwed mothers. The act does provide a working guideline to the procedure required and lends certainty by setting out the determining factors. Although most of these appear from the case law, they would assist legal practitioners in advising fathers of their chance of success in bringing such an application or those parties wishing to oppose.

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[193] Act 86 of 1997
[194] Section 2 Act 86 of 1997

It is noteworthy that nowhere is there an indication of the relative weight carried by each factor, hence there might be some confusion until this provision is tested in Court. Parliament has also improved the lot of those fathers who are party to such unions by adding such a consideration to the list of factors. This would assist in overcoming the problems experienced by such fathers in the earlier cases referenced above.[195]

The other section of the act which is relevant is Section 6 which provides that in adoption proceedings involving an extra-marital child, the adoption will not be ordered unless the natural father has been given written notice thereof. The natural father's role in adoption proceedings has received more attention in the subsequent act, The Adoption Matters Amendment Act.[196]

3.2.3 The Adoption Matters Amendment Act

While the Natural Father's Act has been said to owe its existence to the pressure caused by the Fraser judgement, the link between that judgement and the Adoption Matter's Amendment Act (hereinafter the Adoption Act) is far more direct. The Constitutional Court called upon the legislature to draft a new piece of legislation to correct the constitutional invalidity of Section 18(4)(d). It was decided that a mere striking out of the section would not suffice. As the title of the act suggests, it serves to amend other pieces of legislation and does not constitute an act on its own.

The preamble to the act states,

> "To provide for the rights of certain natural fathers where the adoption of their children born out of wedlock has been proposed and for certain notice to be given."

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[195] Docrat v Bahyat supra,
[196] Act 56 of 1998

It is immediately clear that not all fathers are to be vested with the same rights as the statute provides for "certain natural fathers" only. While the act incorporates the same definition as the Natural Father's Act, it provides an interesting definition of the term, "natural father":

> "A male person whose gamete has contributed to the child as a result of a sexual relationship with the mother of such child."

The question must then be asked why legislators have added the term "sexual relationship" to the definition. There seem to be two possible answers. Either the emphasis is to be placed on the word "sexual " in which case the drafters wished to exclude sperm donors from the ambit of the act. This seems to be unnecessary as The Children's Status Act[197] provides that where a couple avail themselves of assisted reproduction techniques involving donor gametes, all ties between the donor and the child are severed and the child is deemed the legitimate child of the woman and her husband. The act could alternatively be focusing on the second word of the phrase "relationship" thereby requiring the parents to have conceived a child through an ongoing relationship and not merely through an act of rape.

The body of the act amends the offending provisions of the Child Care Act 74 of 1983. Section 17, which lists the categories of persons who may adopt a child, was amended in 1991 to include "unmarried persons" in the list of potential adoptive parents[198]. Before 1991 a natural father would not have been eligible to apply for the adoption of his child, if he was an unmarried person. It is submitted that this is an absurd state of affairs and it is the amendment is to be welcomed. The Adoption Act takes the matter even further by specifically inserting the

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[197] 82 of 1997

[198] Child Care Amendment Act 86 of 1991

category of the natural father as a class of person who might apply for the adoption of a child born out of wedlock.

The crucial changes which were brought about by the Adoption Act were to Sections 18 and 19 of the Child Care Act. Section 18 (4)(d) now reads that where a child is born out of wedlock that consent to his or her adoption is required by both parents whether or not such parents are minors or married. However the act qualifies that the natural father's consent will only be necessary where the father had acknowledged himself in writing to be the father and has made his whereabouts and identity known.

Section 19A requires that a notice be served on a parent who has not offered his or her consent. It calls upon the parent to grant or withhold consent within 14 days of the delivery of the notice or to advance reasons why his or her consent should not be dispensed with in terms of Section 19. In the case of the natural father, it allows him to apply for the child's adoption.

Delivery of the Section 19A notice on natural fathers is only required in cases where the father has registered himself as the father in terms of The Births and Deaths Registration Act 1992. While the act safeguards the rights of children by requiring that only certain fathers are notified of pending adoption proceedings, the act does not provide for those fathers who may not have been notified of the birth.

Section 19 provides a list of circumstances in which an adoption order might be effected without certain persons' consent. The new act provides that the in the cases of children born out of wedlock, the consent of the natural father who has not acknowledged himself as such or who has not responded to a notice provided for in the new section 19A is not required.

Section 19A provides further that the consent of a parent who has failed to discharge his or her parental duties without good cause shown shall also be dispensed with. This section is a very sensible addition as it avoids the possible consequences of a net of parental responsibility which is too widely cast. It was hypothesised in the SALC working paper that it might not be in the best interests of children to require the consent of certain parents who might deny such consent in order to be obstructive[199]. The act thus lays down a filtering mechanism whereby only those involved parents are required to consent.

This section deals with Boberg's criticism,[200] mentioned above, which posits that Courts should not penalise fathers for non-involvement with their children if such non-involvement is caused by the obstructive behaviour on the part of the mother. The new act provides that a parent who has failed to discharge his parental duties without "good cause shown" is not required to offer his or her consent to the adoption. Hence it must be asked as to the causes which would constitute "good cause". Presumably a father who has been prevented from discharging his duties by the mother of the child would be able to allege that he had "good cause" and would not be prejudiced by the mothersobstructiveness.

The act goes on to recognise the very real social issues which unfortunately face many single mothers in this country. The act dispenses with the consent of those fathers who have conceived out of rape or incest or who have been found guilty of crimes of violence involving either the mother of the child or the child. This stipulation serves to strengthen the position of both the child and the unwed mother and as such is a particularly significant amendment.

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[199] SALC Working Paper op cit par 8.20
[200] Boberg "The Sins of the Father" p 35

3.3 Recent case law

There has been only one reported judgement subsequent to the Fraser[201] decision and the promulgation of The Natural Father's Act, Wicks v Fisher[202] However, even that case predated the commencement date of the said act.

The Wicks v Fisher[203] case concerned the application by a natural father for an interdict restraining the mother of the child, intent on emigrating, from taking the child with her to the United Kingdom. The father wished the interdict to operate as interim relief pending an application by him for custody of the child. Hence the nature and scope of a father's right to custody did not require attention by the Court, only the question of whether the father had a prima facie right to interim relief. The Court attempted to answer the question by considering whether he had made out a case of a reasonable prospect of success in a future custody application.

The Court stated at p507 of the judgement,

> "It is quite clear that the applicant as the natural father, has a right to claim custody if it is proved that the custodian parent is not a fit and proper person to exercise custody, bearing in mind always that any decision in this regard will involve also what is in the best interests of the child. In this regard I make reference to the case of Douglas v Mayers ...."

This extract is susceptible to attack on two grounds. Firstly the Court appears to be following a reactionary approach whereby the father's claim of custody is to be premised on proof that the mother is an unfit parent. This approach, it is respectfully submitted, is to be shunned, as the consideration of the best interests of the child in recent cases has not demanded such a high standard of

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[201] Fraser v Children's Court 1997 (2) SA 261 (CC)
[202] Wicks v Fisher 1999 (2) SA 504 (NPD) at p 507

proof from the father. The question should be asked whose care would be better for the child and not whether the mother is unfit as this would mean that only in exceptional circumstances would the father stand a chance. As this case was decided subsequent to the Natural Fathers Act, even though the act was not yet in force, it is submitted that the case was to be guided by the spirit of the legislation which marked a departure from such thinking.

Secondly, It is respectfully submitted that this case erred in relying on the case of Douglas v Mayers, a case which has been severely criticised recently for imposing an unnecessarily strict and burdensome standard of proof upon the natural father.[204]

The Court later redeemed itself by stating that although the father in the Common Law does not have inherent rights in respect of his child that this did not mean that he had no rights at all.[205] The Court eventually decided the matter by holding that it would be in the best interests of the child were custody to be resolved by a thorough consideration of all the facts and that such a consideration would only be possible if the mother and child remained in the country. The Court therefore granted the interdict. The Court recognised the change in current trends in respect of fathers' rights. Ultimately the Court was swayed by what it considered to be in the best interests of the child.

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164 ibid

[204] B v P op cit, B v S op cit

[205] Wicks v Fisher op cit at p 507

4. FOREIGN JURISDICTIONS

4.1 England

As has been shown above, our courts and academics have been guided to a large extent by developments in other jurisdictions and more particularly by the legal system of the United Kingdom.[206] In matters concerning children, that jurisdiction is particularly relevant as it has also been consistently declared in England that the best interests of the child are decisive in all disputes involving access, custody and guardianship.

As is stated emphatically, if not tautologically, in the 1985 judgement A v C[207] and quoted with approval in B v S,[208]

> " It [access] is a matter to be decided always entirely on the footing of the best interests of the child, either by agreement between the parties or by the Court if there is no agreement ... The first and paramount consideration is the welfare of the child, bearing in mind, of course, the wishes and feelings and so on of the respective parents and other people concerned with the child, but always bearing in mind the that the decision must rest in terms of the best interests of the child"

4.1.1 English Common Law

Although in terms of the Common Law of South Africa the extra-marital child was held to have had only one parent, the mother, in terms of English Law the extra-marital child had no legal relationship with either parent. The child was considered a *fillius nullius*,[209]or "nobody's child"[210]Hence, while there was great discrepancy between married and unmarried persons, unlike the traditional South African Common Law, at first there was little distinction between mothers

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[206] Fraser v Children's Court Pretoria op cit , B V S op cit , Van Erk v Holmer op cit, Clark and Van Heerden op cit

[207] A v C [1985] FLR 445 (CA) at 455E-H

[208] B v S op cit p 580 at par D

[209] Cretney and Masson Principles of Family Law p 602

and fathers. The fact that illegitimate children were legally "parentless" impacted negatively on their status and welfare as neither parent was responsible for the support of the child.

4.1.2 English Legislation

Legislative reform to the Common Law occurred in three phases. In 1971, the Guardianship of Minors Act was passed. In terms of this act the father could apply either for rights of access or custody to his child. That act was criticised for not allowing for situations where the unmarried couple had entered into an agreement relating to the parental rights and duties in respect of their children. Another shortfall of that act was that it oddly prohibited joint custody orders which does not seem to accord with the best interest principle as in particular cases, joint custody may be the most appropriate order.

The English Law Commission, like its South African counterpart, conducted an investigation into the status of illegitimate children and the status of their relationship with their parents. In 1979 the Commission investigated the position of extra-marital children and recommended that the legal distinctions based on legitimacy be eradicated from the Law.[211] The Commission went so far as to suggest that the relationship which these children enjoy with their parents was to be placed on an equal footing with that enjoyed by legitimate children. The upshot of this would have been that natural fathers would have been accorded the same automatic rights as married fathers. However this recommendation was rejected by lobbyists for one-parent families as it was argued on that the mother was still the parent who remained responsible for the child's care and as such would have been left vulnerable by such a provision.[212]

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[210] Hogget Parents and Children p 32
[211] ibid

4.1.2.1 The Family Law Reform Act, 1987

The various Law Commission investigations resulted in the enactment of The Family Law Reform Act (hereinafter the "1987 Act"). In this act it was conclusively established that the natural father was a "parent" for legal purposes and that he could apply for a "parental rights order" in order to exercise parental authority in respect of his child.

The 1987 act did not only lend definition to the class of people who might be termed 'parent'; it also regulated the factual question of paternity. Unlike the South African statute, the English 1987 act provides that,'scientific tests' may be ordered in any proceedings in which paternity is disputed.[213] It was further legislated that the refusal to submit to testing on the part of the father is corroborative evidence of paternity.[214] It is submitted that the compelling of parties to submit to testing is perhaps unnecessary, especially as the legal presumptions and negative inferences that are drawn by the courts are capable of achieving the same effect.

The 1987 act like its predecessor, the 1971 act, did not provide for parental agreements whereby the parties would agree on the issues of parental authority among themselves. The drafters omitted such a provision as it had been decided at that time that such an agreement would,

> "erode the institution of marriage, by blurring the legal distinction between marriage and other relationships."[215]

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[212] ibid
[213] Bainham op cit p 217
[214] ibid
[215] Bainham op cit p 218

It is submitted respectfully that this is an unacceptable approach to have adopted, as it appears to be based, not on the best interests of the child but on a reactionary attitude on the part of the legislature to cohabitation and relationships which fall outside the bounds of matrimony.

The provisions of the 1987 act were incorporated into the governing statute, which is still applicable today, The Children's Act 1989. The 1989 act did not differ greatly from the 1987 act except in the following respects. The latter statute spoke in terms of "parental responsibility" orders whereas the former provided for "parental rights "orders. This is a positive change as it shifts the emphasis from the rights of parents to the welfare of children by stressing the duties that parents have to their children and not the rights that they hold in respect of their children.

The 1989 act introduced a change in terminology in that the accepted legal terms of 'custody' and 'access' were replaced by the terms of "residence' and 'contact'. The relevance of this change is unclear as the content of these terms has not been altered. The drafters may have wished to use terminology, which would be more accessible to the average layperson.

4.1.2.2 The Children's Act 1989

In terms of the act, the mother of an extra-marital child has automatic parental responsibility over the child.[216]However the natural father is only accorded the opportunity to apply for the granting of a parental responsibility order. This is not to say that he has no recognition. As Hogget stated,

> "This does not mean he has no relationship with the child. He is the child's "parent " whether or not he has parental responsibility, this means that he is liable to support the child; he may also be punished for neglect or ill-treatment; he is normally entitled to be consulted by the social services and to have contact with a child they are looking after

> and he can always go to court for an order about the child's upbringing. The act also provides for several ways in which he may assume full responsibility , sharing it with the mother."[217]

Hence English Law in a similar manner to South African Law is clear on the point that an unmarried father has a duty of support, however his entitlement to be involved in the upbringing of the child is less clear.

The English Law Commission considered a suitable definition of the term, 'parental responsibility'. It concluded that the statute should not list the components which make up the list as this was seen to be too restrictive. The Commission was concerned that the term be flexible enough to encompass the varying needs and circumstances of different children of different ages.[218] Hence the English statute has chosen not to list the components of parental responsibility as is the case in the Scottish legislation.[219] Instead Section 3 (1) of the Act provides,

> "In this Act parental responsibility means all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property."[220]

Authors have elaborated on this definition and have suggested the following list of factors which should make up the term, "parental responsibility". These include the following rights; the right to physical possession over the child, the right to direct the child's upbringing, the power to control the child's education, the right to discipline the child, administer the child's property, to represent the child in legal proceedings, to choose the child's religion, to consent to the marriage and medical treatment of the child and the right to have contact with the child. The

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[216] Hogget op cit p 32
[217] ibid
[218] Cretney &Masson op cit p 640
[219] ibid
[220] Section 3 (1) Children's Act 1989

duties have been listed as the duties to care for the child and maintain him or her.[221]

What strikes one first about this list is that it seems to defeat the purpose of the term, "parental responsibility" as the authors list mainly rights whereas the duties are in the minority. It is therefore interesting to note that some legal commentators have not altered their perspectives on children's rights.

The Scottish equivalent of the English Childrens Act, The Childrens Act 1995 provides a comprehensive list of parental responsibilities. The act lists the following parental responsibilities; to safeguard and promote the child's health, to provide direction and guidance to the child, in a manner appropriate to the child's stage of development, where the child is not living with the parent, to maintain personal relations and direct contact with the child on a regular basis and to act as the child's legal representative.

The Act guarantees certain rights which are needed to fulfil these responsibilities. These include; the right to have the child live with the parent, to regulate the child's upbringing in a manner consistent with the child's stage of development and to maintain personal relations and direct contact with the child on a regular basis.[222]

It is submitted that the Scottish approach is preferable to that of the English. It clearly lays out the responsibilities that rest in parents and only accords those rights needed to perform those duties. The Scottish Act therefore displays a commitment to children's rights.

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[221] op cit p 612-623

[222] Sutherland " The unequal struggle- Fathers and Children in Scots Law Brixley v Lynas and Sanderson v McnMAnus" p 199

4.1.2.2.1 Parental Responsibility Orders

The English Children's Act 1989 states at Section 2,

> " Where a child's father and mother were not married to each other at the time of his birth-
> (a) the mother shall have parental responsibility for the child;
> (b) the father shall not have parental responsibility for the child, unless he acquires it in accordance with the provisions of this Act. "

In terms of Section 4 of that act, an unmarried father may apply for parental responsibility, which would in appropriate circumstances apply alongside that of the mother.[223] The effect of the granting of such an order is that the father has the same parental authority as a mother or married father.

Although the Scottish Law Commission recommended that natural fathers be awarded automatic parental responsibilities and rights, The effect of the Scottish Children's Act 1995 is very similar to its English counterpart. The natural father is provided with the opportunity to apply to Court for parental responsibility.

The test that the English Court applies in the applications for a parental responsibility order have been laid down in the judgement of Re H[224] and has been consistently followed, not only in subsequent English decisions, but also in

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[223] Cretney and Masson p 638
[224] Re H [1991] 2 ALL ER 185 (CA)

the South African case of B v S.[225]The following passage of the English judgement appears in that decision, [226]

> "The method adopted was not to equate the father of a child born out of wedlock with the father of a legitimate child: it was to give the putative (or natural) father the right to apply for an order giving all the parental rights and duties with respect to the child.."

Balcombe LJ went on to state that in an application for a parental responsibility order, the Court will consider, the degree of commitment which the father has shown towards the child, the degree of attachment which exists between them and the reasons the father has for applying for the order.[227] This test was created in order to distinguish between those fathers who could have a positive impact on their children and those who might endanger their welfare. The test was used in the decision of B v S[228] and later in the Fraser judgements.[229]

It is submitted that the test is a pragmatic one and is aimed at protecting the best interests of the child. However as the South African statute, The Natural Father's Act has provided a more detailed and extensive list, it is submitted that that list is preferable. The factors mentioned in Re H[230] are not as extensive as that of the acts. The English example provides even less certainty to the would-be applicant than does the South African example.

4.1.2.2.2 Parental Responsibility by formal agreement

The unwed father might also gain parental responsibility via the agreement of the mother. The agreement is to be written in the prescribed from and registered with the Court to have any force or effect. In these instances the Court plays an

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[225] B v S op cit
[226] B v S op cit p 582 par J
[227] op cit p 640
[228] B v S op cit
[229] Fraser v Children's Court Pretoria 1997 (2) SA 218 (T)

administrative role as it does not conduct an investigation into the child's welfare when it registers such an agreement.

Although the Law Commission was hesitant to introduce this provision, it was welcomed by most legal commentators as a practical and cost effective manner in which the welfare of children is to be safeguarded. It is submitted that there should be a cursory investigation at least by the equivalent of the family advocates office as to the content of the agreement and whether it promotes the welfare of the child.

The South African statute does not unfortunately provide for the attaining of rights via a formal agreement. The reason why this is unfortunate is that it would save the father the costs and alleviate him of the burden of bringing such an application to Court. This is not to say that the Court should not be involved at all but it is submitted that the agreement should be introduced into our law subject to certain safeguards. The Family Advocates office should be involved in checking that the child's interests are promoted by the agreement and the agreement should be capable of registration through a chamber book application which would be quick and low cost.

4.1.2.2.3 Residence, Contact and other orders

In terms of Section 8 of the Act, the father may apply for a contact order which is defined as,

> "an order requiring the person with whom the child lives ...to allow the child to visitor stay with the person named in the order or for the person and the child to have contact."

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[230] Re H op cit

This order allows the unwed father a right to claim access to the child. It is therefore not necessary for their father to apply for parental responsibility in order to have access to the child. This appears to be a sensible ruling as, as stated above, access is the parental right, which is traditionally that of the father. South African Courts have been criticised for not differentiating between access applications and other parental claims. It is therefore logical that the father need not prove that he is entitled to parental responsibility in order to exercise access.

Section 8 continues to state that a person might apply for a residence order. This is defined as, "an order settling the arrangements to be made as the person with whom a child is to live." A residence order granted in the father's favour automatically bestows upon him parental responsibility over the child. Hence a father wishing to assume control over the child might either apply in terms of section 4 for a parental responsibility order or a residence order in terms of section 8. A residence order is what we would understand to be a custody order and is defined as such for the purposes of the Hague Convention.

4.1.2.2.4 Adoption

Cretney and Masson write,[231]

> " Although the unmarried father does not have parental responsibility the law does not treat him as if he were a stranger to his child. He is now a parent within the meaning of any post 1987 statute. Thus, he does not require leave to seek an order giving him parental responsibility or any section 8 order...However the father's consent is not required for the child's adoption or freeing for adoption and he need not be notified of the adoption proceedings unless he is maintaining the child. "

Hence a natural father would not be involved in adoption proceedings unless he had acquired custody over the child or parental responsibility over the child or if

[231] Cretney and Mason op cit p 635

he was supporting the child. To an extent the adoption agency may still be required to contact a father who does not maintain the child however only in so far "as is reasonably practicable and in the interests of the child."[232]

Although the Law Commission considered extending the list of fathers who would be involved to include those fathers who had access rights or contact orders, this suggestion was later rejected as being "too flimsy a basis on which to give the father rights which may not be in the best interests of the child."[233] It is averred that this approach is incorrect .It is frankly absurd to regulate that a father who has regular contact with his child is not entitled to be notified and required to give his consent in the adoption proceedings of his child.

Recently there has been pressure in England placed on Parliament to change the law relating to adoption.[234] The Law Commission recommended in the Review of Adoption Law that natural fathers play a more important role. However little has changed and the adoption agencies have merely been encouraged to make greater efforts to contact the father.[235]

4.1.2.3 Law of the United Kingdom as a Comparative Model

It would appear that the jurisdictions of England and Scotland are faced with similar dilemmas to our own. It is interesting to note that all three systems adopt a similar approach. While Law Commission reports in all three countries have at some stage recommended the awarding of automatic rights to unwed fathers, legislation to that effect has never been passed. Legislators have all fallen short of effecting a drastic change to the law on the basis that an automatic award might endanger the welfare of the child and may place the single mother at risk.

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[232] op cit p 917
[233] Bainham op cit p 225
[234] Cretney and Masson op cit p919
[235] Cretney and Masson op cit p 920

It is difficult to know whether these concerns outweigh the seeming injustice suffered by single fathers. However, little is said of the danger to the child- father relationship in not granting those rights.

The English model is useful in that the award of parental responsibility through agreement is surely an option for South Africa. It is submitted that the adoption laws of South Africa are far more balanced to all parties and provide a better system than the English example. However the United Kingdom emphasis on parental responsibilities is to be emulated.

The Scottish statute provides a useful model and South Africa could gain by adopting their stance on parental rights and responsibilities. Parental rights should only be granted inasmuch as they are needed in the discharging of parental responsibilities on all parents.

5. CONCLUSION

It is very difficult to assess whether the legal relationship between a natural father and his child has changed in a real sense since the Fraser judgement.[236] There has certainly been an increased awareness of the problems facing natural fathers and an attempt to introduce legislation to rectify any seeming injustices which they may have suffered.

However, as has been shown above, despite the sympathy which the legislators and judiciary may have had to the natural father, the law has not changed to the extent that the natural father is accorded an inherent right to access, custody or guardianship of his child. On a practical level, the natural father is still faced with the onerous task of proving his claim before a High Court before he has a recognised claim to his child.[237] The recent reforms, which have made his

[236] Fraser v Children's Court Pretoria North 1997 (2)SA 261 (CC)
[237] Natural Fathers Act op cit

consent a pre-requisite for a valid adoption have however made a real difference to the role of the natural father in adoption proceedings.[238]

The reasoning advanced by the Courts and the legislators is that their primary responsibility is to the child and as such they are prevented from extending the ambit of the natural father's rights. It has been assumed by the Law Commission[239] and the Court that the awarding of automatic rights to a natural father would pose a threat to the child.[240] This assumption rests on the perception that the single mother is usually the parent charged with the responsibility of caring for the child and as such should not be burdened with the onus of repelling an undesirable natural father.[241]

It is unfortunately not possible here to examine whether the assumption adopted by the drafters has a sound social basis and whether there is a need for Parliament to introduce greater protective mechanisms to protect a child from an unmarried father rather than a married father. However it should be noted that many foreign jurisdictions have adopted the same cautious approach to the awarding of parental rights to a natural father as is evident in the United Kingdom example.[242]

It is submitted that there is merit to the approach adopted by Howie J in the B v S decision. In that case he opines that if the emphasis is shifted from parental rights to children's rights, that there would be less concern regarding the rights to equality of unmarried fathers. He held in B v S at p 582,

" If one is to speak of an inherent entitlement at all, it is that of the child, not the parent ...The importance of that conclusion lies not only in its identification of the person in whom any inherent

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[238] Adoption Act op cit
[239] SALC Report 1994 op cit par 8
[240] B v S op cit , F v L op vit , Wicks v Fisher op cit , T v M op cit
[241] SALC Report 1994 op cit par 8, B v S op cit,
[242] Bainham opcit

right truly vests, but also in its demonstration of the practical reality that the father of an illegitimate child is not unfairly discriminated against. "

Not only would this approach eliminate any doubt regarding the unfair discrimination of unmarried fathers, but it would also be in accordance with the UN Convention of the Rights of the Child and Section 28 of the Constitution. However the shift can only be enforced by thoroughness on the part of the Courts whereby the true interests of the child are investigated through a searching assessment of the facts. Legal commentators and practitioners would also have to undergo a shift in thinking. As was evident in the English example, although the statute accorded parental responsibility, the authors persisted in listing mainly rights in a definition of that term.[243]

However the Howie solution[244] does not alter the fact that fathers who have been divorced are automatically awarded certain rights whereas unmarried fathers are not. By placing the burden of proof on the unmarried father to prove that his involvement is in his child's best interests, the legal system has made a value judgement regarding the relative worth of the two categories of father.

This situation would be alleviated somewhat were we to follow the United Kingdom example and provide for formal agreements granting the father parental authority.[245] In this way the Law still allows the mother a say regarding the father's involvement in the child's life yet neither party is forced to litigate. This agreement would presumably operate similarly to a consent paper incorporated in a decree of divorce and would place the single father on an equal footing to his married counterpart. Although the natural father would have to litigate if agreement could not be reached, the same result would occur in a divorce.

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[243] Cretney and Masson p620
[244] B v S op cit

In an assessment of the reforms, it is important to bear in mind that the Law reformers were not necessarily seeking uniformity among all fathers but certainty in procedure and a more consistent jurisprudence. The Natural Father's Act has eliminated the confusion by laying down clear criteria for courts to follow. This would mean that the extreme approaches on either side described as the traditional approach and the inherent rights approach should no longer from part of our law. It must also be noted that he natural father has come a long way in being recognised since the early Common Law. He is no longer a "legal stranger to his child".[246]

Lawrie Fraser could not enjoy the fruits of his labour and has not been allowed to be involved in the upbringing of his child. Yet perhaps the greatest indicator of the change that has resulted from the Fraser judgements[247] is, that were the Courts faced with the same set of facts today, only a few year after the event, the adoption would not have been approved without his consent.

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[245] Hogget op cit p 45
[246] Docrat v Bahyat op cit
[247] Fraser v childrens Court Pretoria North 1997 (2) SA 261(CC)

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